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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Idaho's statutory scheme under which a use tax is imposed on advertising supplements printed outside of Idaho and then distributed within Idaho by newspapers is violative of the First Amendment because Idaho imposes absolutely no comparable tax on the same advertising supplements printed and distributed by Idaho newspapers.

2. Whether Idaho's taxation of advertising supplements printed outside of Idaho by advertisers violates the Equal Protection Clause of the Fourteenth Amendment because there is no rational distinction between those advertising supplements and identical supplements printed and distributed by Idaho newspapers upon which no comparable tax is imposed.

3. Whether Idaho's imposition of a use tax on advertising supplements printed outside of Idaho violates the Commerce Clause because Idaho exempts from any comparable tax advertising supplements printed and distributed in Idaho by Idaho newspapers.*

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* All parties to this case are named in the caption. Appellant, K Mart Corporation, has an interest in, but does not wholly own, the following subsidiaries and affiliates: Meldisco; Grupo Astra S. A.; and G.J. Coles & Coy, Ltd. Appellant has no other parent company, subsidiary or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

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v.

IDAHO STATE TAX COMMISSION,

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On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

K Mart Corporation ("K Mart"), the appellant, appeals from the final decision of the Supreme Court of Idaho reversing a decision of the trial court, the latter of which held a regulation issued and implemented by the Idaho State Tax Commission ("Tax Commission"), appellee herein, to violate the Equal Protection Clause of the Fourteenth Amendment. Under the decision of the Supreme Court of Idaho, the statute pursuant to which K Mart was assessed a use tax with respect to advertising supplements shipped into Idaho by K Mart has been enforced against K Mart notwithstanding K Mart's contention that it could not be taxed under that statute by virtue of the First Amendment as applied to the States through

the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Commerce Clause. The question of the constitutionality under the First Amendment of a similar taxing scheme is presently *sub judice* in this Court in *Arkansas Writers' Project, Inc.* v. *Ragland*, No. 85-1370 (U.S. argued Jan. 20, 1987); this Court has also noted probable jurisdiction in a case which would appear to present a similar challenge under the Commerce Clause to a purported business and occupation tax imposed by the State of Washington, *Tyler Pipe Industries, Inc.* v. *State of Washington Department of Revenue*, Nos. 85-1963 & 85-2006 (U.S. prob. juris. noted Oct. 6, 1986).

OPINIONS BELOW

The opinion of the Supreme Court of Idaho of September 18, 1986 is reproduced in App. A, *infra*, 1a-12a, and is reported at 727 P.2d 1147 (Id. 1986). The order of the Supreme Court of Idaho of November 7, 1986 denying the appellant's Petition for Rehearing is reproduced in App. B, *infra*, 13a-14a, and is unreported. The judgment of that court, known as a remittitur, of November 7, 1986 is reproduced in App. C, *infra*, 15a. The decision and order of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, is reproduced in App. D, *infra*, at 16a-25a; the judgment of that court is reproduced in App. E, *infra*, 26a-27a; neither is reported. The Memorandum Opinion and Order of the Idaho Board of Tax Appeals is reproduced in App. F, *infra*, 28a-31a, and is unreported.

JURISDICTION

In its decision, the trial court, App. D, *infra*, 22a, squarely held, in response to appellant's argument advanced under the Equal Protection Clause of the Fourteenth Amendment, that the regulation at issue in this case

> "impermissibly distinguishes between the same advertising supplement printed by out-of-state printers and newspaper printers. [The regulation] imposes no sales or use tax on the newspaper printers' production of advertising stuffers distributed with the newspaper while expressly imposing a tax on the sale of the same advertising stuffers prepared by third-party printers."

Because of this holding, the trial court did not reach the merits of appellant's challenges to that regulation under the First Amendment and the Commerce Clause.

On appeal, the Supreme Court of Idaho reversed the trial court's judgment in a decision which, while it suggested that the regulation at issue was indeed unconstitutional, reasoned that the state statute pursuant to which the tax at issue was imposed on appellant was itself facially neutral and, therefore, "K Mart remains liable [for the tax] under the statutory scheme." For reasons discussed more fully below, appellant submits that this Court has appellate jurisdiction over this case under 28 U.S.C. 1257(2). *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). A Notice of Appeal of this case to this Court was filed in the court below on February 2, 1987. App. G, *infra*, 32a. This appeal is being docketed in this Court

within 90 days from the denial, on November 7, 1987, of appellant's Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the Constitution provides, in pertinent part, that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

3. The Commerce Clause, Article I, § 8, cl. 3 of the Constitution, provides, in pertinent part, that:

> "The Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . . ."

4. IDAPA 35.02.13-15A (now IDAPA 35.02.13, 15.c.), reads, in pertinent part, as follows:

> "*Advertising Stuffers.* The sale of 'advertising stuffers' (*i.e.*, printed advertising separate from but distributed concurrently with a newspaper) by the printer to the advertiser constitutes a retail sale of tangible personal property. The advertiser is the consumer of the printed advertising. The purchase by him, therefore, is taxable. A newspaper, however, is purchased at retail by the reader. If the

> newspaper publisher sells advertising in his own newspaper, no taxable sale has occurred between the newspaper and the advertiser. Likewise, if the publisher prints an advertising stuffer to be distributed concurrently with the publisher's own newspaper, no taxable sale has occurred . . . .
>
> "When the advertising stuffer is printed out of the state and shipped into Idaho for use and distribution, then a taxable use has occurred. Again, the consumer of these advertising supplements is the advertiser. A use tax must be paid by the advertiser and should be reported in the appropriate space on his sales tax return."

5. *Idaho Code* § 63-3621 read, during the time relevant to this case, as follows:

> "Imposition and rate of the use tax.—A. An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1965, for storage, use, or other consumption in this state at the rate of three per centum (3%) of the value of the property . . . ."

STATEMENT OF THE CASE

Appellant, K Mart Corporation, is a Michigan corporation which operates retail stores throughout the United States, including the State of Idaho. As part of its nationwide advertising effort, K Mart produces "mats" of items available for sale at its stores, which it then has printed to produce uniform, high-quality,

four-color advertising supplements, sometimes referred to as "advertising stuffers." The printing for each publication of K Mart's advertising supplements is done by one of several independent printers, none of whom are located in Idaho; the advertising supplements are then shipped by common carrier to newspapers in various States, including Idaho. In Idaho, the newspaper publishers with which K Mart contracts then incorporate K Mart's advertising supplements into their newspapers (usually along with other pre-printed material such as comics, t.v. magazines, etc.) and distribute their newspapers. No sales tax is imposed on K Mart's advertising supplements in the States in which they are printed.

In Idaho, a general sales (excise) tax is imposed on "each sale at retail." *Idaho Code* § 63-3619. This tax is applicable to all newspapers sold at retail. Under the first sentence of IDAPA 35.02.13-15A (hereafter "Regulation 15A"), this sales tax is confirmed as generally applicable to advertising supplements which are printed in Idaho by non-newspaper printers—"The sale by the printer to the advertiser constitutes a retail sale . . . ." Paralleling this imposition of a sales tax, Idaho imposes a use tax (at the same rate—presently 5%—as the sales tax) on advertising supplements which are printed outside of Idaho. *Idaho Code* § 63-3621. Thus, whether K Mart's advertising supplements are printed without or within Idaho, they are generally taxed on a comparable basis and at the same rate.

Regulation 15A, however, creates an absolute exemption from imposition of the sales tax on one class of advertising supplements printed within Idaho. Under that exemption, if K Mart has its supplements

printed and distributed by an Idaho newspaper, "no taxable sale has occurred." It is this preferential, discriminatory treatment of Idaho newspapers which was the primary basis for K Mart's federal constitutional challenge to Regulation 15A in the Idaho courts.

After various administrative proceedings, the Idaho Board of Tax Appeals affirmed a deficiency assessment against K Mart in the sum of $9,263.46 in use tax with regard to advertising supplements upon which K Mart had not paid tax during the taxable period from April 1, 1974 through December 31, 1977.[1] K Mart thereafter posted a bond and appealed that decision to the District Court of the Fourth Judicial District. In that court, K Mart argued, *inter alia*, that Regulation 15A, because it exempted Idaho newspaper publishers from any tax on advertising supplements printed by them for inclusion in their newspapers, was violative of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Commerce Clause.[2]

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[1] Although Regulation 15A did not go into effect until December 3, 1975, the appellee did not contend below that any sales tax had been imposed on Idaho newspaper publishers in connection with their printing and distribution with their newspapers of advertising supplements prior to that date. Thus, the discrimination practiced under Regulation 15A was practiced by the State of Idaho for the entirety of the taxable period involved in this case. Regulation 15A remains in full force and effect to the present day, having been redesignated as IDAPA 35.02.13, 15.c. App. A, *infra*, 6a, 727 P.2d, at 1150.

[2] Because the opinions of the District Court and the Supreme Court of Idaho do not expressly acknowledge K Mart's reliance on the First Amendment and the Commerce Clause, appellant has lodged with the Clerk of this Court simultaneously with the docketing of this appeal ten copies of pertinent portions of its

The District Court, after carefully examining the nature of the discrimination established and concededly implemented by appellee, concluded, App. D, *infra*, 23a-24a, that:

> "There is no rational distinction between the third party printers or the newspaper printers. The advertising supplements are neither more nor less a part of the newspaper when prepared by out-of-state printers than when prepared by the newspaper .... Discrimination between similar taxpayers for which there is no rational basis is a violation of the equal protection clause of the Constitution. *Sioux City Bridge* [*Co.*] *v. Dakota County*, 260 U.S. 441 (1923) ...."

Thus, the District Court held that "Idaho Regulation 13-15A impermissibly distinguishes between the same advertising supplement printed by out-of-state printers and [in-state] newspaper printers." App. D, *infra*, 22a.

On appeal, the Supreme Court of Idaho did not disturb the District Court's finding that there was no "rational basis" to support taxation by Idaho of appellant's advertising supplements while no tax would have been imposed on those same supplements if printed and distributed by an Idaho newspaper. Rather, the court below candidly acknowledged that "the sales tax regulations may make questionable distinctions regarding the tax consequences to advertisers using newspapers rather than third party printers

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brief and the brief of appellee in the court below which establish that the First Amendment and the Commerce Clause issues were joined.

. . . ." App. A, *infra*, 7a, 727 P.2d, at 1150. Instead of declaring Regulation 15A unconstitutional, however, the court below reasoned as follows:

> "Even if the tax regulation is unconstitutional, or simply inconsistent with the statute, as it appears to be, K Mart remains liable under the statutory scheme. The constitutional integrity of the applicable statutes has not been attacked."

App. A, *infra*, 7a, 727 P.2d, at 1150.

In its brief in support of a timely filed Petition for Rehearing, appellant argued that the facial neutrality of the statutes under which a use tax was imposed on it (§ 63-3621) and under which a sales tax might have been, but for Regulation 15A, imposed on newspapers (§ 63-3619), was not dispositive of its challenge to Regulation 15A. In addition, appellant pointed out that the court had not addressed in its decision the other arguments advanced in support of the District Court's judgment including, *inter alia*, appellant's First Amendment and Commerce Clause challenges. The court below denied that petition without commenting on the former point and stating, in response to the latter, that those issues "were not discussed because they were found by the majority to be without merit."[3] App. B, *infra*, 13a. Appellant appeals from the decision and subsequent order of the Supreme Court of Idaho which have, together, the practical and legal effect of upholding Regulation 15A

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[3] Because the First Amendment and Commerce Clause issues were joined in the court below, *see* note 2, *supra*, the order denying rehearing establishes that they were decided against appellant, albeit *sub silentio*, by the court below.

against appellant's contention that that regulation, which had and has the force of law in Idaho, violates the First Amendment as applied to the States through the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Commerce Clause.

A. Appellate Jurisdiction

There is no doubt that the questions presented in this appeal were properly presented to and decided by the Idaho courts and that, therefore, this Court has jurisdiction over this case.[4] *See generally Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983). There is, however, an issue regarding this Court's appellate jurisdiction over this case pursuant to 28 U.S.C. § 1257(2).

Under § 1257(2), appellant must have "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . ." Appellant did draw into question the validity of Regulation 15A and, as discussed above, the District (trial) Court squarely declared that regulation to be violative of the Equal Protection Clause. Regulation 15A is clearly a "state statute" for purposes of § 1257(2), *see Lathrop* v. *Donohue*, 367 U.S. 820, 824-25 (1961) *and cases cited*, particularly in view of *Idaho Code* §§ 67-5217 & 67-5218, pursuant to which Regulation 15A was approved by the Idaho legislature.[5] In reversing the trial court's judgment, the court be-

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[4] *See* notes 2 & 3 and text accompanying note 3, *supra*.

[5] These statutes would appear to render untenable the suggestion found in the concluding sentence of the opinion of the court below that Regulation 15A might be "inconsistent" with other legislative enactments which comprise the tax scheme that has produced unconstitutional discrimination against appellant.

low cast substantial doubt on the constitutionality of Regulation 15A, but in an apparent attempt to avoid deciding appellant's facial constitutional attack on that regulation, took the position that the statutes involved (as purportedly distinguished from Regulation 15A) had not been "attacked."

This Court's cases, however, make clear that in a situation in which a taxpayer has successfully challenged the imposition of a state tax as violative of the Equal Protection Clause, the statute under which the tax was imposed—as distinguished from another state law which may have actually created the unconstitutional exemption from taxation giving rise to the violation of that Clause—may not be enforced. *See, e.g., Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959).

Furthermore, in *Allied Stores* this Court exercised *appellate* jurisdiction where the appellant had challenged, under the Equal Protection Clause, a tax exemption provided to other taxpayers. The Ohio Supreme Court, refusing to reach the merits, held that the remedy would be to strike the exemption for other taxpayers and that therefore the appellant lacked standing to raise the claim. In this case the court below, at least for the purpose of this Court's appellate jurisdiction, effectively denied appellant standing to challenge Regulation 15A under its facile and erroneous statement that "[t]he constitutional integrity of the applicable statutes has not been attacked." Like the statutory exemption at issue in *Allied Stores*, Regulation 15A remains in force after the decision below. It was challenged on its face by appellant, and therefore the "integrity" of the appli-

cable Idaho law was "attacked." It follows that the court below necessarily sustained the validity of Regulation 15A for purposes of this Court's appellate jurisdiction because if that regulation gave rise to an unconstitutional taxation of appellant during the taxable period at issue, it is unconstitutional and appellant cannot be required to pay that tax.[6] This Court may, in any event, treat these papers as a petition for writ of certiorari under 28 U.S.C. 2103 and exercise jurisdiction pursuant to 28 U.S.C. § 1257(3).

B. The Questions Are Substantial

1. ***The First Amendment Question***

In preparing and distributing its advertising supplement, appellant is engaging in activity protected by the Free Speech and Free Press Clauses of the First Amendment notwithstanding that the supplements fall into the category of "commercial speech." *See Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, No. 84-1903 (U.S. July 1, 1986), 106 S. Ct. 2968 (1986). Under Idaho's tax scheme, appellant is given essentially two choices with respect to the communication of its constitutionally protected speech to the purchasers of newspapers in Idaho: (1) appellant may have its commercial speech printed by an independent printer, within or without Idaho, and suffer the imposition of a sales or use tax on that speech; or (2) appellant may give its printing business to Idaho newspapers and thereby further

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[6] Because of the three-year statute of limitations imposed on the assessment of unpaid taxes under *Idaho Code* 63-3633, none of the newspapers who benefited from this preferential treatment in 1974-1977 could now be forced by appellee to pay a comparable tax on the supplements which they printed and distributed.

subsidize the ability of those newspapers to communicate their protected speech to their readers while avoiding the imposition of any comparable tax on appellant's advertising supplements. That the Idaho taxation scheme implements a system of preferential treatment for Idaho newspaper publishers is obvious; the unconstitutionality of this differential taxation in the context of persons exercising equivalent First Amendment rights is correspondingly clear.

In *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court struck down as violative of the First Amendment a Minnesota statute that imposed on certain newspaper publishers a use tax on the cost of ink and paper utilized in the production of newspapers. As observed by the Court, the normal function of such a use tax is to protect a State's sales tax by preventing purchasers of goods from going out-of-state to purchase tax-free goods. Observing that Minnesota had chosen not to apply its general sales and use taxes to newspapers,[7] this Court nonetheless went on to point out that the use tax at issue "singled out the press for special treatment." *Id.*, at 582. That "singling out" led this Court to examine the "special problems created by differential treatment" of the press, *id.*, at 583, and to conclude that a State, in order to justify such differential treatment, must dem-

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[7] Because, as noted in the text above, Idaho applies its general sales tax to the sale at retail of newspapers, its imposition of use or sales taxes on advertising supplements printed other than by newspapers constitutes double taxation of those items, a form of differential taxation indistinguishable analytically from the taxing scheme at issue in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

onstrate "an overriding governmental interest." *Id.*, at 582.

The *Minnesota Star* case is much like this case in several respects. There, the discrimination in Minnesota's tax scheme favored some speakers—smaller newspapers—over other speakers—larger newspapers—because the State provided an exception for the first $100,000 of ink and paper purchased in any given tax year. Here, the preferential treatment is even more blatant: if the newspaper prints the speech (the supplements), there is no use (or equivalent) tax imposed. Thus, when appellant imports its speech into Idaho in pre-printed form that speech is taxed, but newspapers exercising the right to engage in the same commercial speech are not.[8] It would be difficult to posit state action which more clearly violates the injunction of this Court that

> "[T]he concept that government may restrict the speech of some elements of our society

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[8] Because newspapers engaged in printing and distributing advertising supplements are engaging in the exercise of exactly the same category of speech—commercial speech—as is appellant, the fact that the newspapers also engage in other speech which may enjoy greater First Amendment protection is irrelevant to the question whether Idaho's preferential treatment of Idaho newspapers is violative of the First Amendment. Certainly the question whether newspapers may be given such preferential treatment vis-a-vis advertisers such as appellant in these circumstances would present a substantial question of first impression in this Court. Appellant notes that this issue would not appear to be presented in *Arkansas Writers' Project, Inc.* v. *Ragland, supra*, because in that case the discrimination directly at issue is between magazines devoted to specific subjects and other more "general purpose" magazines (both of which must, in addition, be printed and published within Arkansas in order to enjoy exemption from the Arkansas tax).

> in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."

Buckley v. *Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

In the Idaho courts, the appellee forthrightly acknowledged that Idaho's tax scheme gave preferential treatment to newspapers; what appellee and the court below failed to recognize is that appellant, in the exercise of *its* First Amendment rights, was being unconstitutionally burdened by a tax which did not fall on newspapers exercising the identical First Amendment right to engage in commercial speech.[9] A state tax scheme which imposes different burdens on the same class of persons exercising identical First Amendment rights is *per se* unconstitutional. *See Minnesota Star*, 460 U.S., at 591-92; at 593 (White, J., concurring in part and dissenting in part).

The question of the power of a State, in its taxation scheme, to discriminate among speakers engaged in speech protected by the First Amendment is before this Court in *Arkansas Writers' Project, Inc.* v. *Ragland*, No. 85-1370 (U.S. argued Jan. 20, 1987). This Court's notation of probable jurisdiction in that case

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[9] As this Court indicated in *Minneapolis Star*, even "preferential" treatment of the press vis-a-vis other taxpayers not exercising free speech rights is subject to strict scrutiny because of the potential that *any* differential treatment of the press creates a situation in which "the government might be able to achieve censorial effects . . . ." 460 U.S., at 588. In this case, the apparent power of the Idaho legislature to eliminate the tax exemption enjoyed by newspapers under Regulation 15A establishes one of the dangers to free expression—the threat of censorship—which the First Amendment, as construed in *Minneapolis Star*, prohibits.

itself establishes the substantiality of the First Amendment question presented in this appeal. In *Arkansas Writers'*, the appellant has challenged the authority of Arkansas to exempt from taxation one class of magazines based upon the subject matter of their content and the place of their printing and publication—religious, professional, trade and sports journals printed and published in Arkansas, while imposing a tax on other magazines which, whether or not devoted to those subjects, are not printed and published within Arkansas. Appellant submits that even if this Court were to uphold the power of Arkansas to engage in such content-based discrimination in its taxing scheme—a result that would appear to be inconsistent with the holding and *ratio decidendi* of *Minneapolis Star*, there would nonetheless be no rational basis for the discrimination worked by the Idaho tax scheme in this case, which burdens one class of speakers that engages in precisely the same speech as the unburdened class of speakers.

2. *The Equal Protection Clause Question*

Appellant's Equal Protection Clause challenge comes to this Court in a somewhat unusual posture because the trier of fact—the District Court—squarely (and correctly) rejected every basis upon which appellee sought to justify the imposition of this use tax on the appellant in the absence of the imposition of *any* comparable tax on the same material if printed by an Idaho newspaper. As that court reasoned, App. D, *infra*, 23a-24a:

> "There is no difference in the product prepared by either printer or in the printing services performed. K Mart provides the "mats". The "mats" are turned into colored

advertising supplements designed for incorporation into the newspapers. In either case, the newspapers have exclusive possession or control over the advertising supplements from production until delivery to the subscriber. The third party printed supplements are kept as permanent records of the newspapers. Subscribers are entitled to receive the advertising supplement and the newspaper will ensure delivery if it is not supplied to a particular subscriber. In both cases, the newspaper distributes the advertising supplements. There is no rational distinction between the third party printers or the newspaper printers. The advertising supplements are neither more nor less a part of the newspaper when prepared by out-of-state printers than when prepared by the newspaper . . . . Similarly situated taxpayers must be afforded equal treatment. Discrimination between similar taxpayers for which there is no rational basis is a violation of the equal protection clause of the Constitution. *Sioux City Bridge* [*Co.*] *v. Dakota County Nebraska*, 260 U.S. 441 (1923); *Hillsborough T.P. v. Cromwell*, 326 U.S. 620 (1946). Further, the improper treatment of newspaper printers, entitles K Mart to receive the benefit impermissibly conferred by the state on newspaper printers. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 590 (1931). K Mart is, for this reason, entitled to a refund of the amounts illegally assessed as a use tax deficiency."

The rejection by the District Court of the justifications for the discriminatory treatment at issue was not seriously questioned by the Supreme Court of Idaho on appeal. Indeed, and as pointed out above, that court appeared to agree with the District Court with respect to the unconstitutionality of Regulation 15A, disagreeing only with regard to whether, under that circumstance, appellant should be immune from the use tax because of the purported facial neutrality of the statutes implicated. The Supreme Court of Idaho, at least implicitly, has recognized that appellant and Idaho newspapers are constitutionally indistinguishable with respect to the printing of advertising supplements.[10] Thus, the decision below is inconsistent with prior decisions of this Court and is substantial.

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[10] Under this Court's decisions, a state tax will generally be upheld under the Equal Protection Clause so long as there is a "rational" basis for the classifications drawn in that statute. Such classifications, however, are subject to a higher degree of scrutiny if they affect a "fundamental interest" or are "based upon a suspect criterion." *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 195 (1983). As appellant argues above, this case involves its fundamental interest under the First Amendment to engage in commercial speech on the same basis as all others who would engage in such speech, including Idaho's newspapers. The presence of this interest would necessitate a higher degree of scrutiny even if some "rational basis" for the Idaho scheme could be conjured up. One superficially "rational" basis might stem from the fact that appellant is not an Idaho corporation and the supplements are printed outside Idaho. It would, of course, be "rational" for Idaho to try to force national businesses who rely on advertising supplements to have those supplements printed in Idaho. Such a purpose would, however, clearly contravene the Commerce Clause, Art. I, § 8, cl. 3, as discussed in the text *infra*.

3. *The Commerce Clause Question*

The use tax imposed on appellant is facially violative of the Commerce Clause because Idaho has not and does not, pursuant to Regulation 15A, impose any comparable tax on the *same* products—advertising supplements—if they are printed and distributed by Idaho newspapers. As this Court has repeatedly stated:

> "A cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against intrastate commerce . . . by providing a direct commercial advantage to local business." ' "

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263, 268 (1984), *quoting Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977) (*quoting Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959)). There is no plausible argument that the combination of the use tax imposed on appellant's advertising supplements when printed outside Idaho and the exemption from any comparable tax granted to Idaho newspapers by Regulation 15A does not "clearly . . . discriminate on its face against interstate commerce by bestowing a commercial advantage" on Idaho newspapers. *Id.*, at 268.[11]

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[11] Appellant notes that Arkansas's tax scheme at issue in *Arkansas Writers' Project, Inc.* v. *Ragland*, *supra*, would appear to be equally vulnerable to challenge under the Commerce Clause because the Arkansas scheme exempts from its sales tax certain magazines only if they are printed and published within Arkansas. Because the magazine involved in that case is printed and published in Arkansas, the publisher of that magazine apparently

In *Bacchus*, this Court struck down as violative of the Commerce Clause a tax exemption granted by Hawaii for certain locally produced alcoholic beverages in the context of an overall tax scheme under which alcoholic beverages imported into Hawaii *and* other alcoholic beverages produced within Hawaii were taxed by the State. The Idaho taxation scheme at issue here is remarkably parallel to the Hawaii scheme; in Idaho, advertising supplements printed and distributed by Idaho newspapers have no separate tax imposed, while the identical supplements are taxed if they are printed outside Idaho or within Idaho by a non-newspaper printer.[12] In this case, the incidence of this tax fell squarely on appellant, which could only have avoided the tax by contracting with an Idaho newspaper to print and distribute its advertising supplements. The decision below cannot be reconciled with the analysis or result reached in *Bacchus* and

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has no standing to assert a violation of the Commerce Clause. Thus, the question of the constitutionality of the Arkansas tax scheme as applied to out-of-state publications may remain open irrespective of how the Court rules on the question presented in that case.

[12] Unlike the facts of *Bacchus Imports Ltd.* v. *Dias*, 468 U.S. 263, 268-69 (1984), there is no argument available to Idaho that newspaper publishers in Idaho (the favored class) are not in direct competition with members of the disfavored class of out-of-state advertisers such as appellant. Here, as in *Bacchus*, the fact that the tax scheme also disfavors in-state, non-newspaper printers who may desire to compete for the printing of advertising supplements does not save Idaho's tax scheme from facial invalidation. In any event, the appellee Tax Commission introduced no evidence below upon which any such argument could now be predicated.

other cases of this Court; therefore, this question is substantial.[13]

C. The Questions Presented Have Generated Conflicts Among The State Courts And Require Resolution By This Court

The differential, discriminatory taxation imposed by Idaho at issue in this case is by no means unique. A number of States have in place similar schemes under which their in-state newspapers are given preferential tax treatment regarding the taxation of advertising supplements as compared with out-of-state corporations such as appellant. *See, e.g., K Mart Corp.* v. *South Dakota Department of Revenue*, 345 N.W.2d 55 (S.D. 1984); *Ragland* v. *K Mart Corp.*, 274 Ark. 297, 624 S.W.2d 430 (1981); *Sears, Roebuck & Co.* v. *Woods*, 708 S.W.2d 374 (Tenn. 1986); *Wisconsin Department of Revenue* v. *J.C. Penney, Co.*, 108 Wis.2d 662, 323 N.W.2d 168 (1982); *Caldor, Inc.* v. *Heffernan*, 183 Conn. 566, 440 A.2d 767 (1981). Constitu-

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[13] The Idaho tax scheme at issue is clearly less defensible than West Virginia's gross receipts tax struck down by this Court in *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). In this case, there is no even arguably "compensating" tax imposed on Idaho newspapers which print supplements at the behest of advertisers. The application of the Commerce Clause to yet another more defensible tax scheme is presently before this Court in *Tyler Pipe Industries, Inc.* v. *State of Washington Department of Revenue*, Nos. 85-1963 & 85-2006 (U.S. prob. juris. noted Oct. 6, 1986), due to be argued on March 2, 1987. In that case, the State of Washington would appear at least to have a colorable argument that the "multiple activities exemption" to its gross receipts tax does not discriminate on its face against interstate commerce because out-of-state manufacturers who sell their products in Washington, like in-state manufacturers who sell in Washington, enjoy that exemption. In this case, no such argument is available to Idaho.

tional challenges to such discriminatory taxation were expressly rejected by the Supreme Court of Tennessee in *Woods* and by the Supreme Court of Wisconsin in *J.C. Penney, Co.*

In other States, courts have construed similar statutes to grant pre-printed advertising supplements tax exempt status on an equal basis with supplements printed by newspapers. *See, e.g., In re K Mart Corporation*, 238 Kan. 393, 710 P.2d 1304 (1985); *Daily Record Co.* v. *James*, 629 S.W.2d 348 (Mo. 1982); *Eagerton* v. *Dixie Color Printing Corp.*, 421 So.2d 1251 (Ala. 1982); *Sears, Roebuck & Co.* v. *State Tax Commission*, 370 Mass. 127, 345 N.E.2d 893 (1976). Significantly, in three of these four cases the courts reached this result in the context of challenges to the constitutionality of the statutes at issue if interpreted to deny a tax exemption to supplements printed other than by newspapers. Indeed, in *Eagerton* the Supreme Court of Alabama held that the differential treatment between newspapers which printed advertising supplements and printers who sold the same supplements to advertisers was "constitutionally unacceptable." 421 So.2d, at 1254.[14]

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[14] Although the opinion of the Supreme Court of Alabama does not specifically cite to the Equal Protection Clause of the Fourteenth Amendment in its *Eagerton* decision, that decision affirmed the trial court's judgment that the taxing scheme, as applied, "resulted in an unconstitutional application" of the Alabama tax statute at issue. 421 So.2d, at 1252. Given the express reliance by the Supreme Court of Alabama on this Court's decision in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928) (striking down Pennsylvania tax statute under Equal Protection Clause of the Fourteenth Amendment), *see* 421 So.2d, at 1253, and the fact that Alabama's constitution contains no equivalent of the federal Equal Protection Clause, it is apparent

Although a square conflict among the foregoing cases as regards the Equal Protection Clause question is presented only by *Eagerton*, which upheld such a challenge, *see* note 14 *supra*, and *Woods*, which rejected, 708 S.W.2d, at 382-83, an Equal Protection Clause challenge indistinguishable from that in *Eagerton* and this case, a cursory reading of all nine of these cases discloses considerable divergence among these state supreme courts as regards the appropriate analysis of the federal constitutional questions presented in this appeal and the results which should obtain. Thus, the need for this Court to determine the applicability of the Federal Constitution to such preferential treatment of newspapers in the context of the taxation of advertising supplements is clear and pressing.[15]

CONCLUSION

Probable jurisdiction should be noted and this case set for argument to resolve the substantial federal

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that *Eagerton* involved a state statute struck down under the Equal Protection Clause of the Fourteenth Amendment.

[15] As illustrated by this case, *see* text accompanying note 6, *supra*, and other cases cited in the text above, there is also confusion among the state courts regarding the remedy which must be extended to a litigant who has been taxed in an unconstitutional manner. *See, e.g., Arkansas Writers' Project, Inc.* v. *Ragland, supra*; *Sears, Roebuck & Co.* v. *Woods*, 708 S.W.2d 374 (Tenn. 1986). However, it is well established that successful interposition of a federal right against payment of a state tax requires the State to refund or forgive that tax and that the asserted inadequacy of a State's procedures to affect restitution would itself constitute an independent violation of the Due Process Clause of the Fourteenth Amendment. *Ward* v. *Love County*, 254 U.S. 17 (1920).

constitutional questions which have been decided adversely to appellant notwithstanding contrary and controlling precedent in this Court and to resolve the conflict in result and analysis among the state courts which have considered these questions.[16]

February 5, 1987

Respectfully submitted,

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[16] From the briefs of the parties submitted to this Court in *Arkansas Writers' Project, Inc.* v. *Ragland*, *supra*, it is unclear whether the appellant magazine at any time actually applied for an exemption under the very provision of Arkansas law challenged by the appellant, whether the appellee ever administratively determined the appellant to be ineligible for that exemption, or whether magazines (such as "sports" magazines) printed in Arkansas and therefore presumptively eligible for that exemption in fact applied for and received that exemption during the time period at issue. The statutes and regulations at issue in this case, in contrast, present no such ambiguities and may therefore provide a more appropriate framework within which to resolve the substantial federal questions presented in both cases.

APPENDIX

APPENDIX A

1986 Opinion No. 129

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 16234

K MART CORPORATION,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

BOISE, MAY 1986 TERM

Filed: September 18, 1986

Frederick C. Lyon, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. Honorable Deborah A. Bail, District Judge.

Appeal from the district court's order discharging a deficiency judgment against respondent for use taxes allegedly due on newspaper advertising inserts. *Reversed.*

Hon. Jim Jones, Attorney General and Theodore V. Spangler, Deputy Attorney General, State of Idaho, Boise, Idaho, attorneys for the appellant.

Joseph Henry Uberauga II, Boise, Idaho, attorney for the respondent.

HUNTLEY, J.

In this case we determine whether an advertiser, which has its advertising supplements printed out-of-state and

which then pays a newspaper to insert and deliver the supplements with the newspaper, is subject to payment of use tax on the cost of the purchase of the supplements from the printer.

K Mart Corporation creates "mats" from which an out-of-state printer prints newspaper advertising inserts. The printer ships the inserts to newspapers selected by K Mart. Through contracts with these newspapers K Mart designates the number of inserts to be distributed at any given time as well as the date of distribution.

Once the newspapers receive the inserts they exercise exclusive possession over the supplements and determine the precise method of their distribution. If an insert is missing from a given newspaper, the paper must provide an insert to any complaining customer.

The Idaho State Tax Commission determined K Mart owed use tax on the inserts. The Idaho Board of Tax Appeals affirmed. On appeal to district court the parties cross motioned for summary judgment. The district court held the advertising inserts fell within the use tax statute but were nevertheless not taxable for two reasons: First, the inserts were a component part of the newspaper, bringing it within the production exemption of I.C. § 63-3622(d), and second, the sales tax regulation interpreting the applicable statutes violated equal protection. The Idaho State Tax Commission (commission) appeals.

The first issue we decide is whether the inserts are subject to the use tax statute. If we rule the inserts fall within the statute, K Mart nevertheless argues the sales tax regulation interpreting the statute violates equal protection. The regulation taxes inserts printed by printers other than newspapers while exempting from sales and use tax inserts printed by the distributing newspaper. In the alternative, K Mart argues the inserts fall within the production exemption to the use tax.

To begin our determination of whether the inserts fall within the use tax, as asserted by the commission, we look to the applicable statutes:

> **63-3621. Imposition and rate of the use tax.**— An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1965, for storage, use, or other consumption in this state at the rate of three per centum (3%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property.
>
> (a) Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax.

I.C. § 63-3621 (1974-77).

The term "use" is defined in I.C. § 63-3615(b) as follows:

> **63-3615. Storage—Use.**
>
> . . . .
>
> (b) The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property . . . .

I.C. § 63-3615(b) (1974-77).

Idaho's use tax scheme taxes tangible personal property purchased outside the state that would not otherwise be subject to a sales or use tax in Idaho or any other state. *See* I.C. §§ 63-3621(c) and 63-3615(c). *See, e.g.,* McConville v State Board of Equalization, 85 Cal.App.3d 156, 159, 149 Cal.Rptr. 194, 196 (1978); Avco Manufacturing Corp. v. Connelly, 140 A.2d 479, 484 (Conn. 1958); Southwestern Bell Tel. Co. v. State Com. of Revenue and Taxation, 212 P.d 363, 365-66 (Kan. 1949). Use taxes discourage Idaho

purchasers from avoiding Idaho sales taxes by purchasing property in states with lower or no sales tax. The "mats" prepared by K Mart from which the out-of-state printer prints the inserts are subject to sales tax in Michigan, the state of printing. However, Michigan does not subject the inserts themselves to a sales or use tax.

Under the applicable statutes, and in the absence of an exemption, K Mart is subject to use tax on the inserts if it "exercises any right or power over [the inserts] incident to the ownership . . . of that property." I.C. § 63-3615(b). K Mart purchases the inserts from an out-of-state printer. K Mart therefore owns the inserts until it gives away the inserts to newspaper purchasers, even though it never takes possession of the inserts. Incident to and evidencing that ownership, K Mart contracts with the printer to have the inserts delivered to various Idaho newspapers. Under additional contracts, K Mart obligates the newspapers to include a specified number of the inserts in the newspapers on certain dates.

The newspaper publishers collate the inserts by the same method as the comics, T.V. magazines, and Sunday supplements. The publishers also retain control over the manner of distribution of their newspapers.

K Mart argues that only the consumers receiving the inserts "use" them and that K Mart does not. K Mart apparently argues the purpose of the inserts is to provide potential purchasers with news of goods available and on sale. But all advertising is used by advertisers, such as K Mart, for the purpose of making sales and profits. In light of this and the exercise by K Mart, through its contracts, of rights and powers over the inserts incident to their ownership, K Mart uses the inserts within the meaning of the use tax statute. K Mart Corp. v. South Dakota Dept. of Revenue, 345 N.W.2d 55, 58 (S.D. 1984); Miller Brewing Co. v Korshak, 219 N.E.2d 494, 498 (Ill. 1966); appeal dismissed in Miller Brewing Co. v. Jones, 386 U.S. 684

(1967); rehearing denied in Miller Brewing Co. v. Jones, 387 U.S. 938 (1967); and rehearing denied in Miller Brewing Co. v. Jones, 389 U.S. 946 (1967). Consequently, K Mart must pay use taxes on the insert unless the inserts fall within a statutory exemption.

K Mart argues the inserts fall within the production exemption of I.C. § 63-3622(d) (1974-77), which reads in part:

> **63-3622. Exemptions.**—There are exempted from the taxes imposed by this act the following:
>
> . . . .
>
> (d) Receipts from the sale, storage, use or other consumption in this state of tangible personal property which will enter into and become an ingredient or component part of tangible personal property *manufactured,* processed, mined, produced or fabricated for ultimate sale at retail within or without this state, *and* tangible personal property primarily and directly used or consumed in or during such manufacturing, processing, mining, farming, or fabricating operations by a business or segment of a business which is *primarily devoted to such operation* or operations, provided that the use or consumption of such tangible personal property is necessary or essential to the performance of such operation. . . [Emphasis added.]

This statute exempts two types of tangible personal property: the property that becomes a component part of property sold at retail and property used or consumed in the production of property sold at retail. Further restricting each of these two clauses is the limitation of the exemption to a "business or segment of a business which is primarily devoted to such operation or operations" as "manufactur-

ing, processing, mining, farming, or fabricating." I.C. § 63-3622(d). This limitation modifies both the component part and consumption exemptions of the statute. If the legislature had intended to limit only the consumption exemption, the legislature would have used the disjunctive "or" rather than the conjunctive "and" between the two exemption clauses. The district court erred in finding the inserts exempt as component parts of the newspaper, without having first determined the operation to which K Mart is primarily devoted. Since K Mart is primarily devoted to retailing and not to "manufacturing, processing, mining, farming, or fabricating" (that is, K Mart is not a producer of inserts for resale), the production exemption does not apply to K Mart. K Mart must, therefore, pay use taxes on its advertising inserts.

The district court also held K Mart not liable for use tax on a second ground. The court said IDAPA 35.02.13, 15-A[1] (now IDAPA 35.02.13, 15(c)) violates the equal protection clause of the fourteenth amendment to the federal

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[1] C. *Advertising Stuffers.* The sale of "advertising stuffers" (i.e., printed advertising separate from but distributed concurrently with a newspaper) by the printer to the advertiser constitutes a retail sale of tangible personal property. The advertiser is the consumer of the printed advertising. The purchase by him, therefore, is taxable. A newspaper, however, is purchased at retail by the reader. If the newspaper publisher sells advertising in his own newspaper, no taxable sale has occurred between the newspaper and the advertiser. Likewise, *if the publisher prints an advertising stuffer to be distributed concurrently with the publisher's own newspaper, no taxable sale has occurred.* To the extent that a newspaper publisher prints advertising supplements which are not to be distributed as part of this newspaper, he is a contract printer and a retailer of the printing. A sales tax must be collected on the sales price charged to the advertiser.

When the advertising stuffer is printed out of the state and shipped into Idaho for use and distribution, then a taxable use has occurred. Again, the consumer of these advertising supplements is the advertiser. A use tax must be paid by the advertiser and should be reported in the appropriate space on his sales tax return. [Emphasis added.]

constitution. This administrative regulation declares sales of inserts from printers to advertisers as taxable, while exempting inserts printed by the newspaper which ultimately distributes the inserts. Concluding this classification violated equal protection, the district court held K Mart not liable for use taxes.

While the sales tax regulations may make questionable distinctions regarding the tax consequences to advertisers using newspapers rather than third party printers, the statutory scheme makes no such distinction. Under that scheme, K Mart owes use tax on the inserts. I.C. §§ 63-3621, 63-3615(b). If a taxpayer owes tax under a statutory scheme that is constitutional, assessment of the tax pursuant to a regulation that does not comport with the constitution or with the statutory scheme does not defeat the taxpayer's statutory liability. The tax statutes are fully enforceable even if no tax regulation interpreting them exists. Statutes control interpretive regulations. To the extent a regulation is unconstitutional it is inconsistent with the constitutional statute it purports to interpret and is, therefore, of no effect to the extent of such inconsistency. *C.f.* Application of State Board of Medical Examiners, 206 P.2d 211, 214-15 (Okla. 1949) (a regulation is ineffective to the extent it is inconsistent with the statute it purports t interpret.) Even if the tax regulation is unconstitutional, or simply inconsistent with the statute, as it appears to be, K Mart remains liable under the statutory scheme. The constitutional integrity of the applicable statutes has not been attacked.

Reversed. Costs to appellant. No attorney fees awarded.

DONALDSON, C.J. and BISTLINE, J., concur.

BAKES, J., dissenting:

The preliminary question in this case is whether the trial court properly decided the cross motions for summary judgment. The general rule governing the granting of sum-

mary judgment motions is that the "non-movant for summary judgment is entitled to have the facts and all reasonable inferences flowing therefrom construed most favorably to the non-movant." Deal v. Cockrell, ___Idaho ___, ___P.2d ___(No. 16136, issued June 30, 1986). But, "where the evidentiary facts are not disputed and the trial court rather than a jury will be the trial of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." Riverside Development Co. v. Ritchie, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). *See* Old West Realty v. Idaho State Tax Comm'n, ___Idaho ___, 716 P.2d 1318 (1986); Kromrei v. AID Insurance Co., ___Idaho ___, 716 P.2d 1321 (1986).

Under the facts of this case, the latter rule controls. Cross motions for summary judgment were filed by both parties. The trail court, sitting as the trier of fact, found no dispute as to evidentiary facts, and therefore no dispute of material fact. The trail court, based upon the affidavits submitted, is entitled to draw whatever inferences it may, even if there are conflicting inferences, for it can and will resolve the conflicts. There are sufficient facts from which inferences could be made which support the trial court's decision, and accordingly this summary judgment should not be disturbed on appeal. Argyle v. Slemaker, 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

The majority opinion found, as did the trail court, that the K-Mart inserts fell within the use tax provision provision of I.C. § 63-3621, and within the use definition in I.C. § 63-3615. The statute requires that a party fall within the use tax before a court can consider the exemptions contained in I.C. § 63-3622.

Based upon these principles, the trail court's decision finding the K-Mart advertising inserts a component part of the newspaper should be affirmed. The majority accu-

rately states the issue and, for purposes of this dissent, it will be restated. In this case we determine whether an advertiser, which has its advertising supplements printed out of state and which then pays the newspaper to insert and deliver the supplements with the newspaper, is subject to payment of a use tax on the cost of the purchase of the supplements from the out-of-state printer. The controlling statutory provision is contained in I.C. § 63-3622(d), which reads:

> "**63-3622. Exemptions.**—There are exempted from the taxes imposed by this act the following:
>
> . . .
>
> "(d) Receipts from the sale, storage, use or other consumption in this state of tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, mined, produced or fabricated for ultimate sale at retail within or without this state, and tangible personal property primarily and directly used or consumed in or during such manufacturing, processing, mining, farming, or fabricating operations by a business or segment of a business which is primarily devoted to such operation or operations, provided that the use or consumption of such tangible personal property is necessary or essential to the performance of such operation."

This section is divisible into three parts which define the parameters of the use tax exemption. The first portion of the exemption relates to

> "receipts [received] from the sale, storage, use or other consumption in this state of tangible personal property which will enter into and become an ingredient or component part of tangible

> personal property manufactured, processed, mined, produced or fabricated for ultimate sale at retail within or without this state."

The second portion of the exemption relates to

> "tangible personal property primarily and directly used or consumed in or during such manufacturing, processing, mining, farming or fabricating operation by a business or a segment of a business which is primarily devoted to such operation or operations."

The third portion of the exemption limits the scope of the second exemption to "the use or consumption of such tangible personal property [which] is necessary or central to the performance of such operation."

The first portion, set out above, exempts those parts of tangible personal property which enter into and become an ingredient or component part of other tangible personal property which is manufactured, processed, produced or fabricated for ultimate sale at retail. The trail court concluded that the K-Mart advertising inserts fell within this first portion of the statutory exemption as a component part of the newspaper. The trail court found the following facts: K-Mart purchased the inserts from an out-of-state supplier and exercises exclusive control over the inserts until delivery to the newspaper company; K-Mart controls the date and size of the advertising distribution; once delivery is made to the newspaper companies, K-Mart relinquishes control of the inserts. The "advertising supplements are distributed with the newspapers." The trail court further found that "the advertising supplements are collated by the newspapers in the same fashion as are comic, TV magazine, and Sunday supplements"; that the various newspaper companies "consider [the advertising supplements as] component parts of their paper." "The supplements are retained in the [newspaper company's] permanent records." The trail court found that "subscri-

bers are entitled to receive the advertising supplement and the newspaper [company] will ensure delivery if it is not supplied to a particular subscriber." The trail court found that, "Advertising is one part of a newspaper. It is no less a part of a newspaper if it is folded into the paper as a separate section than if it is found in the sports pages . . . or if it appears underneath news articles in the body of the newspaper." As the trail court emphasized. "The advertising supplement to a newspaper has no character of its own apart from the newspaper, [and it] is not intended for sale separate from the newspaper, and is incorporated into the newspaper as a component part of it from the time it is printed." Thus, the trial court, acting as the trier of fact, is justified and is supported by sufficient evidence in the record from which inferences could be drawn indicating that the advertising supplements supplied by K-Mart, and as viewed by others in the newspaper industry, are a component part of the newspaper. That finding clearly falls within the statutory exemption as a component part.

K-Mart supplies advertising inserts, tangible personal property, to various newspaper publishers within the State of Idaho. The inserts enter into and become a component part of a newspaper edition. The newspaper, which is tangible personal property, is then sold to the ultimate retail consumer, the subscriber, who pays a sales tax on the sales price. The trial court's finding that K-Mart fell within the exemption contained in the first portion of the statute is not "clearly erroneous" and should be affirmed. I.R.C.P. 52(a); Argyle v. Slemaker, *supra;* Rasmussen v. Martin, 104 Idaho 401, 659 P.2d 155 (Ct. App. 1983); Rauth v. State, 103 Idaho 74, 644 P.2d 1333 (1982); Jensen v. Bledsoe, 100 Idaho 84, 593 P.2d 988 (1979). The creation of a newspaper is a process, *i.e.,* the taking of many parts and joining them together into a whole. Thus, the opinion of the trial court based upon the component exemption portion of the statute should be affirmed.

The majority is correct in stating that the statute exempts two types of tangible personal property, the property that becomes a component part of property sold at retail and property used or consumed in the production of property sold at retail. *See infra* at 5. The second portion of the exemption refers to that type of tangible personal property which is used or consumed in or during such manufacturing, processing, mining, farming or fabricating operations. This exemption would only be applicable if the tax sought to be imposed to be imposed concerned the ink or the paper purchased by the newspaper company and used in the production of the newspaper; since it is not, the second portion is not applicable in this case. The majority states that the third part, the restriction, is applicable to both exemptions. A basic reading of the statute shows that to be incorrect. The restriction is only applicable to the second portion of the exemption. By reading the exemption section as a whole, it is apparent that the restriction applies only to tangible personal property primarily and directly used or consumed in or during such manufacturing. It is not applicable to the first portion of the exemption.

I would affirm the trial court's decision that K-Mart falls within the exemption from the payment of the use tax.

SHEPARD, J., concurs.

APPENDIX B

In the Supreme Court of the State of Idaho

ORDER

No. 16234

Reh. No. 86RH-30

K MART CORPORATION,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

The Respondent having filed a PETITION FOR REHEARING on October 9, 1986 and supporting BRIEF on October 23, 1986 of the Court's Opinion released September 18, 1986; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

In its PETITION FOR REHEARING, K-Mart objected that our Opinion did not treat five of the seven issues raised on appeal. They were not discussed because they were found by the majority to be without merit.

Dated this 7th day of November, 1986.

By Order of the Supreme Court

/s/ CHARLES R. DONALDSON
Charles R. Donaldson, Chief Justice

ATTEST:

/s/ FREDERICK C. LYON
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Bail
West Publishing
Mead Data Central

APPENDIX C

In the Supreme Court of the State of Idaho

No. 16234

K MART CORPORATION,
Plaintiff-Respondent,

v.

IDAHO STATE TAX COMMISSION,
Defendant-Appellant.

REMITTITUR

TO: FOURTH JUDICIAL DISTRICT COURT, COUNTY OF ADA.

The Court having announced its Opinion in this cause September 18, 1986, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

IT IS FURTHER ORDERED that costs in the amount of $216.00 are allowed to Appellant. No attorney fees on appeal.

DATED this 7th day of November, 1986.

/s/ FREDERICK C. LYON
Clerk of the Supreme Court
STATE OF IDAHO

APPENDIX D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 77750

K-MART CORPORATION,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Filed

OCT 9 1985

DECISION AND ORDER

The issue in this case is whether advertising supplements printed by out-of-state printers for use by K-Mart Corporation as inserts in Idaho newspapers are subject to Idaho's use tax. Cross-motions for summary judgment were filed. The issues have been fully briefed and argued. There are no disputes of material fact.

K Mart Corporation (K Mart) is a Michigan corporation which operates retail stores in Idaho. It prepares "mats" of products available for sale at its stores and has them printed to produce uniform, high quality, four-color advertising supplements. The printing is done by out-of-state printers. K Mart contracts with Idaho newspapers for space for the advertising supplements in the newspapers. K Mart specifies the date the supplements are to be inserted in the newspapers and the number of supplements to be inserted. The preprinted advertising supplements are sent

directly to the newspapers which K Mart has contracted with and are separate inserts in the newspapers. The advertising supplements are distributed with the newspapers and the manner and method of distribution is subject to the newspaper's control. The advertising supplements are collated by the newspaper in the same fashion as are the comic, T.V. magazine and Sunday supplements. The newspapers consider them component parts of their paper and the supplements are retained in the permanent records. If a customer is missing a supplement, the newspaper will provide it. Once delivered, the supplements are under the exclusive possession and control of the paper.

The state of Idaho has imposed a use tax on the K Mart advertising supplements. After a Multistate Tax Commission sales and use tax audit and report, a Notice of Deficiency Determination assessed sales and use taxes, with penalties and interest at $43,534.33, covering a period from April 1, 1974 through December 31, 1977. After a request for redetermination by K Mart, the Idaho State Tax Commission (Tax Commission) reduced the deficiency to $11,792.00. K Mart appealed to the Idaho Board of Tax Appeals (BTA). The BTA reduced the deficiency to $9,263.46 with interest and penalties. K Mart filed a timely appeal of the BTA's Order pursuant to I.C. 63-3049.

Idaho imposes an excise tax on the use of tangible personal property in Idaho. I.C. 63-3621. The use tax is complementary to the sales tax. If property which has not been subjected to an Idaho sales tax is used or consumed in Idaho, it is subject to the use tax.

Use "includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of the property." I.C. 63-3615(b). Property held for sale in the regular course of a business is excluded from the definition of "use".

While the "mats" are subject to Michigan's sales tax, no sales tax has been imposed for the advertising supple-

ments prepared by the printer. K Mart argues that since the advertising supplements are inserted into the newspaper, they become a component part of the newspaper, with the only "use" being made by the consumer. It therefore argues that it does not "use" the advertising supplements. It further argues that the "production" exemption, I.C. 63-3622(d), bars the imposition of the use tax and that its imposition in this case is unconstitutional on several grounds.

K Mart contends that once the advertising supplements are shipped to the newspaper, they are under the exclusive control of the newspaper and the only "use" which occurs is by the purchaser of the newspaper who uses the supplements in making consumer decisions. The Idaho definition of "use" is a broad definition which embraces "the exercise of any right or power over tangible personal property incident to the ownership or the leasing of the property". As the California Supreme Court noted in *Union Oil Co. of California v. State Board of Equalization*, 34 Cal. Rptr. 872, 386 P.2d 496 (1963), "ownership is not a single concrete entity but a bundle of rights and privileges as well as obligations" at 500. *Union Oil* recognized that the "use" of a thing can be manifested by receiving the benefits from it.

The "incidents of ownership" of tangible personal property, while they may consist of the possession of the object itself, or of legal title to it, also includes the right to control its disposition and receive benefits from it. K Mart causes the creation of the advertising supplements through its contract with the printer. Through its contracts, it controls the disposition of the advertising supplements from the printer to the newspaper to the subscriber. It arranges for the printer to ship the supplements to the newspapers. It directs the date of distribution of the supplements and the number to be distributed. It also receives the benefits of its exercises of these powers through the use of the

advertising supplements by consumers. It is undeniable that the principal purpose of advertising is to generate consumer demand. Through its advertising supplements, K Mart draws consumer attention to product availability and pricing information with the object of increasing its business profits. While it is true that the printer exercises some control over the advertising supplement and the newspaper has possession and control over the delivered supplements, and the consumer may use it or discard it, the key figure is K Mart. It is K Mart who has ordered its production, it is K Mart who has given the printer and newspaper the right to exercise any power over the supplements, and it is K Mart's Idaho stores who receive the benefits of the advertising in Idaho newspapers. While K mart yields some of the aspects of physical control to others, it "uses" the advertising supplements in Idaho within the meaning of the statute. It exercises its rights or power over tangible personal property incident to its ownership.

This result has been reached by other courts which have considered similar advertising products. In *K Mart Corp. v. South Dakota Dept. of Revenue,* 345 N.W.2d 55 (S.D. 1984), the South Dakota Supreme Court addressed the same issues before this Court. It concluded that K Mart did "use" advertising supplements prepared by out-of-state printers and shipped to South Dakota by virtue of its ownership and power to determine the date of distribution of the supplements and the number of copies to be distributed. In a well reasoned decision, *Miller Brewing Co. v. Korshak,* 219 N.E.2d. 494 (Ill. 1966), the Illinois Supreme Court held that neon signs, clocks and other products which Miller Brewing had prepared out-of-state and shipped to various Illinois distributors were subject to the Illinois use tax because the dominion exercised over them by Miller's was sufficient to establish that Miller's was the owner. It found significant the fact that Miller's caused the items to be brought into being, paid for them and exercised

control over their disposition. In response to Miller's argument that it did not use the advertising signs in Illinois but that others did, the Court said:

> The fact remains, however, that the plaintiff used these signs in Illinois, for its benefit, in the natural way in which signs are used, by causing them to be put up where people could look at them. The power to allow property one owns to be used for one's benefit in this manner is the "exercise" of an incident of ownership.

at 498. The power to control through contract the disposition of advertising in telephone directories was found to be an incident of ownership sufficient for use tax purposes in *L.M. Berry & Co. v. Blackmon*, 203 S.E.2d 520 (Ga., 1974). *See, also Wisconsin Dept. of Revenue v. J.C. Penney Co.*, 323 N.W.3d 168 (1982).

K Mart causes the advertising supplements to be created according to its specifications from "mats" it prepares. It directs their shipment to the newspapers. It controls the dates of distribution and the number. It benefits from its "use" of the advertising supplements through increased consumer attention focused on K Mart and manifested through consumer purchases. K Mart does "use" the advertising supplements in Idaho.

K Mart has raised a number of objections to the imposition of the use tax which will not be addressed because its equal protection and production exemption arguments are dispositive. Extensive argument has been focused on whether the supplements are a component part of the newspaper. Certain cases, including those involving the facts presented by the instant case, have concluded that advertising supplements are not component parts of the newspapers in which they are incorporated. *K Mart Corp. v. South Dakota Dept. of Revenue, supra; Ragland v. K Mart Corp.* 624 S.W.2d, 430 (Ark., 1981); *Wisconsin Dept. of Revenue v. J.C. Penney Co., supra; Caldor Inc. v. Hef-*

fernan, 440 A2d 767 (Conn., 1981). The cases holding that advertising supplements prepared by third party printers are not component parts of the newspapers in which they are enfolded and distributed contain a defect in their analysis which dictate their rejection as useful authority on this issue by this Court. *Caldor Inc., id.,* is the leading case of the view that advertising supplements are not component parts of newspapers and begins with the standard definition of a "newspaper" found in Webster's Third New International Dictionary:

> "a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest . . .".

Caldor then proceeds to hold that there are two aspects of a newspaper: 1.) publication at short, regular intervals and, 2.) routine reporting of "a myriad of topics so that it appeals, at least in part to a wide spectrum of the general public." From this point, *Caldor* concludes that since the advertising supplements are not printed at regular intervals and are not designed to capture a regular audience but to use the newspaper's distribution system, they are not a component part of the newspaper. *K Mart Corp. v. So. Dakota* and *Ragland v. K Mart Corp., supra.,* followed the same reasoning although *Ragland* focused on some additional factors. The problem with *Caldor, Inc.* is that, although it recognizes advertising as part of the collection of parts that is a newspaper, the fact that the part is not the whole is viewed as dispositive. Advertising is one part of a newspaper. It is no less a part of a newspaper if it is folded into the paper as a separate section than if it is found in the sports pages. It is a component part of a newspaper. *Friedman's Express v. Mirror Transportation. Co.,* 71 F.Supp. 991 (N.J., 1947) aff'd 169 F.2d 504 (3rd Cir., 1948) while not a use tax case, discusses the fact that a newspaper consists of a variety of features

in addition to news articles, all of which make up a newspaper. Because a component, the comic supplement in *Friedman's Express,* is shipped separately, it does not lose its character as a component part of a newspaper. In *Sears, Roebuck & Co. v. State Tax Commission,* 345 N.E.2d 893 (Mass,1976), a use tax case interpreting a newspaper exemption statute, the Massachusetts Supreme Court held that advertising supplements prepared for Sears by out-of-state printers and distributed as part of Massachusetts newspapers, were component parts of the newspaper. The Missouri Supreme Court reached the same result in *Daily Record Co. v. James,* 629 S.W.2d 348 (Mo. banc, 1982) a sales tax case interpreting a newspaper exemption. In *Daily Record* the Court noted that the advertising supplement to a newspaper has no character of its own apart from the newspaper, is not intended for sale separate from the newspaper, and is incorporated into the newspaper as a component part of it from the time it is printed.

The better reasoned view is that advertising supplements inserted into a newspaper and distributed with it are component parts of the newspaper. It is uncontradicted that each of the Idaho newspaper editors and publishers whose affidavits are filed in the instant case view the K Mart advertising supplements as component parts of their newspapers. Advertising is part of a newspaper. It is not less a part of the newspaper if it is contained in a separate insert in the newspaper than if it appears underneath news articles in the body of the newspaper.

Idaho Regulation 13-15A impermissibly distinguishes between the same advertising supplement printed by out-of-state printers and newspaper printers. It imposes no sales or use tax on the newspaper printers production of advertising stuffers distributed with the newspaper while expressly imposing a tax on the sale of the same advertising stuffers prepared by third-party printers. Regulation 13-15A provides:

> The sale of "advertising stuffers" (i.e., printed advertising separate from but distributed concurrently with a newspaper) by the printer to the advertiser constitutes a retail sale of tangible personal property. The advertiser is the consumer of the printed advertising. The purchase by him, therefore, is taxable. A newspaper, however, is purchased at retail by the reader. If the newspaper publisher sale has occurred between the newspaper and the advertiser. Likewise, if the publisher prints an advertising stuffer to be distributed concurrently with the publisher's own newspaper, no taxable sale has occurred. To the extent that a newspaper publisher prints advertising supplements which are not to be distributed as part of his newspaper, he is a contract printer and a retailer of the printing. A sales tax must be collected on the sales price charged to the advertiser.
>
> When the advertising stuffer is printed out of the state and shipped in to Idaho for use and distribution, then a taxable use has occurred.

There is no difference in the product prepared by either printer or in the printing services performed. K Mart provides the "mats". The "mats" are turned into colored advertising supplements designed for incorporation into the newspapers. In either case, the newspapers have exclusive possession or control over the advertising supplements from production until delivery to the subscriber. The third party printed supplements are kept as permanent records of the newspapers. Subscribers are entitled to receive the advertising supplement and the newspaper will ensure delivery if it is not supplied to a particular subscriber. In both cases, the newspaper distributes the advertising supplements. There is no rational distinction between the third party printers or the newspaper printers. The advertising supplements are neither more nor less a part of the news-

paper when prepared by out-of-state printers than when prepared by the newspaper. *See, Sears, Roebuck v. State Tax Commission supra.* Similarly situated taxpayers must be afforded equal treatment. Discrimination between similar taxpayers for which there is no rational basis is a violation of the equal protection clause of the Constitution. *Sioux City Bridge v. Dakota County Nebraska,* 260 U.S. 441 (1923); *Hillsborough T.P. v. Cromwell,* 326 U.S. 620 (1946). Further, the improper treatment of newspaper printers, entitles K Mart to receive the benefit impermissibly conferred by the state on newspaper printers. *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 590 (1931). K Mart is, for this reason, entitled to a refund of the amounts illegally assessed as a use tax deficiency.

While the equal protection analysis is dispositive and other issues need not be treated extensively, there is an additional reason for concluding that the use tax should not be imposed on supplements used solely in newspapers. Since the advertising supplements are component parts of the newspaper no matter which printer prepares the advertising supplements which are incorporated into the newspaper, K Mart would be entitled to the non-recognition of the printing transaction conferred on the newspaper which is reflected in Regulation 13-15A and may arise from I.C. 63-3622(d), which exempts tangible personal property produced as a component part of the tangible personal property produced for ultimate sale at retail by one engaged in the newspaper business, and would be applied to K Mart under the operation of I.C. 63-3615(b).

K Mart is entitled to summary judgment in its behalf. The imposition of the use tax on the advertising supplements prepared by third party out-of-state printers is improper.

IT IS SO ORDERED.

DATED This 1 day of October, 1985.

/s/ DEBORAH A. BAIL
Deborah A. Bail
District Judge

APPENDIX E

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTRY OF ADA

Case No. 77750

K MART CORPORATION,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

JUDGMENT

THIS CAUSE, coming on regularly for hearing before the Court upon Cross-Motions for Summary Judgment filed by the parties, on the 14th day of August, 1985, Joe H. Uberuaga, II of the firm of Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered appearing for Plaintiff, K Mart Corporation; and Theodore V. Spangler, Jr., Deputy Attorney General, appearing for Defendant, Idaho State Tax Commission; and the Court having examined and considered the proofs and Affidavits offered by the respective parties, having heard oral argument of counsel; and having

read the respective Briefs of the parties, and the Court being fully advised in the premises and filed its Decision and Order, directing that Judgment be entered in accordance therewith, and there being no genuine issue of material fact, and Plaintiff being entitled to Judgment as a matter of law;

NOW, THEREFORE, by reason of the law and Decision and Order aforesaid, IT IS HEREBY ORDERED, ADJUDICATED AND DECREED that Judgment be, and hereby is, entered in favor of Plaintiff, K Mart Corporation and against the Defendant, Idaho State Tax Commission, and Plaintiff is hereby released and discharged from any and all claims by Defendant of deficiencies for additional use taxes, penalties and interest for the period of April 1, 1974 through December 31, 1977, and that Plaintiff is hereby awarded its costs in the amount of $1,260.00, and that each party is responsible for its own attorneys' fees, and that any bond heretofore filed with this Court is hereby released.

DATED: This 21st day of October, 1985.

/s/ DEBORAH A. BAIL
Deborah A. Bail, District Judge

APPENDIX F

BEFORE THE IDAHO BOARD OF TAX APPEALS

Appeal No. 80-B0223

IN THE MATTER OF THE APPEAL OF KMART CORPORATION from a redetermination by the State Tax Commission of sales/use tax liability

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for hearing on September 14, 1981, in Boise, Idaho, before member Dorothy G. Ellis. Member Leroy R. Kelson later reviewed the record and participates in this opinion. Appellant appeared and was represented by J. Bradley Ronan, Troy, Michigan, as an employee of the corporation; and Theodore V. Spangler, Jr., Deputy Attorney General, represented the Tax Commission. The appeal is taken from that portion of an order of the Tax Commission dated October 21, 1980, which affirms a deficiency assessment of $9,263.46 in sales/use tax with regard to newspaper advertising supplements, plus penalty and interest. The appeal was timely filed, together with a tax guarantee bond for double the amount of the total amended assessment.

At the close of the taxable period, April 1, 1974, through December 31, 1977, Appellant operated nine retail stores in Idaho. The corporation's headquarters are in Troy, Michigan, and it operates similar retail stores in many states. As the result of a Multistate Tax Commission audit, the Tax Commission issued a notice of deficiency determination on February 9, 1979. This was protested by Kmart

Corporation, and subsequently some of the disputed issues were resolved and substantial adjustments to the determined tax liability were made.

The advertising supplements in question are printed by non-Idaho vendors and shipped directly by the printers to Idaho newspapers, which insert them into designated editions for distribution to purchasers of the newspapers. The sole issue for determination by this Board is whether the supplements are subject to use tax in Idaho.

Appellant contends that the supplements are a component part of the newspaper to be sold at retail and that any sales taxes due on the newspaper would be paid by the purchaser of the newspaper; citing a Massachusetts Supreme Judicial Court opinion in *Sears Roebuck and Company v. State Tax Commission,* 345 N.E. 2d 893 (1976), and a decision of the Superior Court of the District of Columbia, Tax Division, of May 13, 1981, in *Sears, Roebuck and Company v. District of Columbia,* Docket #2463.

It is the position of the Tax Commission that the advertiser rather than the purchaser of the newspaper is the user and consumer of the supplement, and that the medium of the newspaper is used as a method of distributing the advertising. Counsel for the Tax Commission cites an April 21, 1981, decision by the Connecticut Supreme Court in *Caldor, Inc. v. Heffernan,* CCH State Tax Cases Reports 250-066.

The Tax Commission further maintains that the sales transaction between Appellant and the out-of-State printer is a retail sale under Idaho Code Sections 63-3609 and 63-3612, and that since the printer is a non-Idaho vendor the transaction is subject to a use tax rather than sales tax; such use tax being imposed on the storage, use or other consumption of tangible personal property in this state under Code Section 63-3621 and the definition of "use" in Section 63-3615(b):

> The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property . . . except that the term "use" does not include the sale of that property in the regular course of business. . .

Appellant argues that no delivery or control is exercised by it over the newspaper advertising supplements in Idaho; the Tax Commission argues that Appellant does exercise right or power by virtue of its contract with the newspaper to distribute the supplements to the newspaper's readers.

The Tax Commission submitted a copy of Regulation 13-15A in support of its position. Appellant claims that the regulation is discriminatory.

After a careful study of the brief of each side and the citations and arguments, this Board accepts the Tax Commission's position in the matter. The amended order of October 21, 1980, is sustained.

DATED his 18th day of January, 1982.

IDAHO BOARD OF TAX APPEALS

/s/ DOROTHY G. ELLIS
DOROTHY G. ELLIS

/s/ LEROY R. KELSON
LEROY R. KELSON

ORDER

In accordance with the foregoing memorandum opinion, IT IS ORDERED that the order of the State Tax Commission dated october 21, 1980, be and the same is hereby sustained.

DATED this 18th day of January,1982.

IDAHO BOARD OF TAX APPEALS

By /s/ ILLEGIBLE
Chairman

APPENDIX G

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Case No. 16234

K MART CORPORATION,

Appellant,

VS.

IDAHO STATE TAX COMMISSION,

Appellee.

FILED

FEB 2, 1987

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that K Mart Corporation, Appellant, appeals to the United States Supreme Court from the final judgment of the Idaho Supreme Court entered in this action on the 18th day of September, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) and any other applicable statutes.

DATED this 2nd day of February, 1987.

EBERLE, BERLIN, KADING, TURNBOW
& GILLESPIE, CHARTERED

By /s/ JOSEPH HENRY UBERUAGA, II
JOSEPH HENRY UBERUAGA, II
Attorneys for K Mart Corporation,
Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of February, 1987, I served two true and correct copies of the foregoing NOTICE OF APPEAL upon the following:

Theodore V. Spangler, Jr.
Deputy Attorney General
State of Idaho
State Tax Commission
P. O. Box 36
Boise, ID 83722

Attorney for Idaho State Tax Commission by depositing said copies in the United States mail, postage prepaid, in an envelope addressed to said person at the address set forth above.

/s/ JOSEPH HENRY UBERUAGA, II
JOSEPH HENRY UBERUAGA, II

Supreme Court, U.S.
FILED
MAR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1286

In The
Supreme Court of the United States
October Term, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

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No. 86-1286

In The

Supreme Court of the United States

October Term, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Idaho Supreme Court on the grounds that the questions presented are so unsubstantial as not to need further argument.

I. K MART'S CHALLENGE OF AN ADMINISTRATIVE REGULATION IS MISDIRECTED BECAUSE THE IDAHO COURT EXPRESSLY REJECTED THE REGULATION AS A GROUND FOR ITS DECISION

K Mart's constitutional challenges attack an administrative regulation which was expressly rejected by the

Idaho Court as the basis for its decision. The Idaho Court held that the regulation was invalid for being inconsistent with the statute. The court said:

> While the sales tax regulations may make questionable distinctions regarding the tax consequences to advertisers using newspapers rather than third party printers, the statutory scheme makes no such distinction. Under that scheme, K Mart owes use tax on the inserts. I.C. §§ 63-3621, 63-3615(b). If a taxpayer owes tax under a statutory scheme that is constitutional, assessment of the tax pursuant to a regulation that does not comport with the constitution or with the statutory scheme does not defeat the taxpayer's statutory liability. The tax statutes are fully enforceable even if no tax regulation interpreting them exists. Statutes control interpretive regulations. To the extent a regulation is unconstitutional it is inconsistent with the constitutional statute it purports to interpret and is, therefore, of no effect to the extent of such inconsistency. *C.f.* Application of State Board of Medical Examiners, 206 P.2d 211, 214-15 (Okla. 1949) (a regulation is ineffective to the extent it is inconsistent with the statute it purports to interpret). *Even if the tax regulation is unconstitutional, or simply inconsistent with the statute, as it appears to be, K Mart remains liable under the statutory scheme.* The constitutional integrity of the applicable statutes has not been attacked. (emphasis added)

J.S. p. 7a.

Idaho follows the common rule that a regulation which is inconsistent with statutory provisions is invalid. *Rawson v. Idaho State Bd. of Cosmetology,* 107 Idaho 1037, 695 P.2d 422 (App. 1985). Accordingly, the Idaho Court looked only to the statutory provisions when it decided that K Mart was subject to Idaho use tax on its printed advertising. As a result, any federal constitutional challenge to

the Idaho Supreme Court's holding must find constitutional infirmity in the statute or its construction by the Idaho court, not an infirmity in the regulation.

The Idaho Supreme Court's decision that K Mart is taxable according to statute is the definitive interpretation of the state's law. State courts are the ultimate interpreters of state law even though their actions are subject to review under the federal constitution, treaties and laws. Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* § 1(c) (1986). The Idaho Supreme Court, as the highest court in the state from which a decision may be had (Idaho Constitution, art. 5, § 2), sits as the ultimate adjudicator of Idaho state law which the United States Supreme Court has no power to revise. *Henry v. Mississippi*, 379 U.S. 443 (1964), Reh. Den. 380 U.S. 926 (1964), On Remand 174 So.2d 348 (1965), Motion Den. 381 U.S. 908 (1965). Determinations of Idaho state law by the Idaho Supreme Court are binding on this Court. *Williams v. Kaiser*, 323 U.S. 471 (1945).

In its effort to demonstrate a substantial federal question, K Mart would have this court invalidate a tax imposed under a valid statute based on its challenge to a regulation expressly rejected by the Idaho Court as the basis for the tax. To support this challenge as a basis for this Court's jurisdiction, K Mart cites *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), and *Allied Stores v. Bowers*, 358 U.S. 522 (1959). J.S. at 11. These cases do not support K Mart's argument.

The facts in *Iowa-Des Moines National Bank v. Bennett, supra,* were that petitioner was properly assessed tax as required by Iowa statute by the county assessor, as

had competing domestic corporations, but the county treasurer and the county auditor, in excess of their statutory authority, collected from the domestic corporations a lesser tax. After holding that the auditor's and treasurer's actions constituted state action within the ambit of the Equal Protection Clause, this Court went on to hold that: "[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines National Bank v. Bennett*, 284 U.S., at 247. Thus, the case dealt with state actions to which the petitioner was actually subjected vis-a-vis the Equal Protection Clause, and never addressed the constitutionality of the Iowa statute. In this case, K Mart was taxed under authority of the statutes and has not actually been subjected to the regulation it challenges.

The issue in *Allied Stores of Ohio v. Bowers, supra*, was whether an Ohio statute exempting from ad valorem taxation "merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for storage only . . ." denied appellant, a resident, equal protection. After holding that the appellant possessed standing to raise the issue because the Ohio Supreme Court upheld the exemption, this Court opined that:

> [h]ere the discrimination against residents is not invidious nor palpably arbitrary because, as shown, it rests not upon the 'different residence of the owner[1],' but upon a state of facts that reasonably can be con-

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[1] As more fully discussed later in this brief, the classification in this case turns on the distinction between sale of a service and sale of tangible personal property, rather than residency as K Mart argues.

> ceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 530.

Clearly, this case does not support K Mart's argument because this Court, in affirming the Ohio Supreme Court, held that the nonresident tax exemption did not violate the Equal Protection Clause where the discrimination did not rest upon the different residence of the owner.

Thus, any substantial federal question for this Court's review must properly be present in the Idaho statute or the Idaho Court's interpretation of it, to which K Mart was actually subject, not the regulation to which it was not subject.

As we shall show in this brief, neither the statute nor the interpretation suffer from the defects which K Mart attributes to the regulation. Any federal constitutional challenges directed at this statutory scheme of taxation are both unsubstantial and correctly resolved below.

II. APPLICATION OF THE IDAHO SALES TAX ACT TO K MART'S PRINTED ADVERTISING

The Idaho Sales Tax Act (Chapter 36, Title 63, Idaho Code, hereafter "the Act") imposes a general retail sales tax supplemented by a complementary use tax. The Act generally taxes tangible personal property used by K Mart in the furtherance of its business activities, in this instance printed advertising materials used to promote products which it holds for sale. Contrary to K Mart's assertions, this tax applies regardless of whether the advertising is

printed in Idaho or outside Idaho. It therefore does not discriminate against interstate commerce. Nor does it violate equal protection requirements because all similarly situated taxpayers are similarly taxed. Any person who purchases printed advertising at retail, that is for any purpose other than resale in the regular course of business, is subject to the same tax (absent some statutory exemptions which are neither relevant nor challenged in this case). However, in common with most state sales tax laws, the tax does not generally extend to purchases of services when the purchase does not include the transfer of ownership of any tangible personal property. For this reason, a purchase of advertising space in a newspaper is not taxed. In such a case, the advertiser acquires no title, possession or interest in tangible personal property. Finally, because the tax is one of general application, it does not offend freedom of the press.

A. THE TAX IMPOSED ON K MART'S ADVERTISING DOES NOT VIOLATE THE COMMERCE CLAUSE

The Idaho Sales Tax is imposed on the retail sale of tangible personal property. Idaho Code § 63-3619 (1986 Cum. Sup.).[2] A retail sale occurs when the purchaser buys the property for any purpose other than the resale of that property in the regular course of its business. Idaho Code § 63-3609 (1986 Cum. Sup.).[3] In common with

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[2] Sec. 63-3619 provided at the time relevant here: "An excise tax is hereby imposed upon each sale of retail at the rate of three percent (3%) of the sales price of all property subject to taxation under this act . . ."

[3] Sec. 63-3609 provides: "The term 'retail sale' or 'sale at retail' means [sic] a sale of tangible personal property for any purpose other than resale of that property in the regular course of business . . ."

all other states imposing a general sales tax, Idaho also imposes a complementary use tax on the "storage, use or other consumption" on tangible personal property in the state. Idaho Code § 63-3621 (1986 Cum. Sup.).[4] The use taxes apply when the retail purchase of the property has escaped sales tax, usually because the property was purchased outside the state.[5] This general pattern of sales tax with a complimentary use tax is unquestionably constitutional. *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

K Mart complains that the tax imposed on it is violative of the commerce clause because under the regulation it challenges there would be no tax on the same product printed and distributed by Idaho newspapers. J.S. p. 19. This contention is fallacious because under the statute and the Idaho Court's decision below, as opposed to the regulation, advertising printed in Idaho is taxed in the same manner as advertising printed outside the

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[4] Sec. 63-3621 provides: "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1965, for storage, use, or other consumption in this state at the rate of four percent (4%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property." As with the sales tax (see note 1), the rate in effect at the time relevant to this case was 3%. *Supra* at note 2.

[5] *McCorville v. State Board of Equalization*, 85 Cal.App.3rd 156, 149 Cal.Rptr. 194 (1978); *Bank of America Nat. Trust & Savings Assoc. v. State Bd. of Equalization*, 209 Cal.App.2nd 780, 26 Cal. Rptr. 348 (1963); *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, 140 A.2d 479 (1958); *Southwestern Bell Tel. Co. v. State Comm. of Revenue and Taxation*, 168 Kan. 227, 212 P.2d 363 (1949); 9 *Vanderbilt Law Review*, 348, 351 (1955-56) 129 ALR 222, 223, s. 153 ALR 609.

state. It is this statutory provision, not the regulation, which is the controlling state law in this case.

The Commerce Clause prohibits a state from imposing a tax which discriminates in favor of in-state taxpayers over those from outside the state. See, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); and *Northwestern Portland Cement Co. v. Minnesota*, 358 U.S. 450, 451 (1959).

Nothing in this statutory scheme applied by the Idaho Supreme Court imposes a tax burden on non-Idaho business which is greater than the burden imposed on Idaho business conducting the same activity. Had K Mart purchased its printed advertising from an Idaho printer, the purchase of this property would have been subject to the Idaho sales tax under Idaho law. Idaho Code § 63-3612 (1976).[6] Because K Mart, in fact, purchased the printing from a printer outside of Idaho before causing it to be brought into the state, the complementary use tax be-

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[6] Sec. 63-3612 provides: "The term 'sale' means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration and shall include any transfer of possession through incorporation or any other artifice found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, an exchange or barter. 'Sale' shall also include: (a) Producing fabricating, processing, *printing, or imprinting of tangible personal property* for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting. . . . (d) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or *printed* to the special order of the customer, *or of any publication*. . . ." (emphasis added)

comes applicable. Idaho Code § 63-3621, *supra* note 4. If K Mart had paid a sales tax to the state in which the printer was located, that tax would be applied as credit against the Idaho use tax. Idaho Code § 63-3621(k) (1986 Cum. Sup.).[7] Because no tax was applied in the state where the property was purchased, the full Idaho use tax applies. Thus, had the same printing been purchased by K Mart from an in-state printer, it would be subject to the same tax as is the printing actually purchased from an out-of-state printer and imported to the state for use in the state.

The only thing which makes this case appear confusing is the manner in which K Mart has chosen to contract for the distribution of its advertising. It has contracted with various newspaper publishers (who necessarily have existing home distribution systems to distribute their own product) to distribute the advertising. K Mart has purchased a service from the newspaper. The newspaper also offers another service which K Mart could have purchased but did not. That is K Mart could have had its advertising printed in the pages of the newspaper itself. The purchase of such advertising is not subject to Idaho sales or use tax because it is not a purchase of tangible personal property. This is true regardless of whether the newspaper involved is published and dis-

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[7] Section 63-3621(k) provides: "When the tangible personal property subject to use tax has been subjected to a general retail sales or use tax by another state of the United States at a rate equal to or greater than the rate of the Idaho tax, and evidence can be given of such payment, the property will not be subject to Idaho use tax. If the rate paid the other state was less, the property will be subject to use tax to the extent that the Idaho rate exceeds the rate of the other state. . . ."

tributed in Idaho or published in another state and distributed in Idaho. Thus advertising purchased from a newspaper is excluded from tax both when the newspaper is published in Idaho and when the newspaper is published outside of Idaho.

It is apparent, therefore, that under this statutory scheme both in-state and out-of-state printing businesses are treated equally. So too are in-state and out-of-state newspapers. The statutory scheme imposes no burden on interstate business not also imposed on the same activities conducted in the state. Exclusions from the tax extend equally to similar in-state and out-of-state businesses. Any implication contained in the administrative regulation to the contrary is inconsistent with this statute and was correctly ignored by the Idaho court. It necessarily follows that there is no discrimination between intrastate and interstate commerce which can be the subject of of Commerce Clause challenge.

B. THE TAX IMPOSED ON K MART'S ADVERTISING DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

There is an undeniable classification inherent in this system. That is, advertising purchased from a third party printer and then distributed to potential customers by a contracted delivery service (in this case newspaper publishers) is subject to Idaho's sales or use tax while advertising space purchased in a newspaper is not subject to tax payable by the advertiser. However any federal constitutional equal protection challenge based on this classification is both unsubstantial and without merit.

The question, of course, is *not* whether a state's tax laws may create classifications with different tax results.

The question instead is whether this specific classification has a recognizable foundation which this Court may conclude is a legitimate basis for supporting it. This Court has historically refused to substitute its own judgment to determine which alternative methods of taxation may be the most fair and equitable.

This Court has expressed the appropriate standard in many cases. In *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977), this Court held:

> This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" [citations omitted]

Id. at 101.

In *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959) this Court held:

> The applicable principles have been often stated and are entirely familiar. The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different spe-

> cific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [citations omitted] "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway, supra,* 281 U.S. at 159.

Id. at 526-527.

In *Madden, Executor v. Kentucky,* 309 U.S. 83 (1940), this Court said:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. [footnote omitted] This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' [footnote omitted] and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. *It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* [footnote omitted] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the pesumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. [footnote omitted] The burden is upon the one attacking the legislative arrangement to negative *every conceivable basis* which might support it. [footnote omitted] [emphasis supplied]

Id. at 87-88.

In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) Reh. Denied 411 U.S. 910 (1973), this Court stated:

> The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966). Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled [footnote omitted], the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

Id. at 359.

Finally, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), reaffirmed the often stated rule that a "... distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it ..." *Id.* at 357. *See also, Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580 (1935); *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61 (1913); *Carmichael v. Southern Coal Co.,* 301 U.S. 495 (1937).

The classification in this case distinguishes between advertising printed in a newspaper and advertising purchased from a third party. This is a rational distinction which presents no substantive equal protection issue for this Court to decide.

In one situation, the newspaper prints advertising which is distributed with its own product to the public. The advertiser is paying the newspaper for advertising services. Ownership and control over the tangible personal property is maintained by the newspaper until it is sold to

its customer. The advertiser never purchases or owns the property.

In the second situation, a third party printer prints the advertising pursuant to a contract with the advertiser and ships it to a newspaper publisher pursuant to the same contract. In short, the advertiser buys the property from the printer and then pays the newspaper to deliver the advertiser's property to the public.

The different tax consequences of these two situations are squarely based on very different legal and economic differences between the parties. The transaction taxed involves the transfer of ownership of property—i.e., the printed advertising. The transaction not taxed involves no transfer of ownership of tangible personal property between the parties to the contract. Because the Idaho sales tax, like most state sales taxes, focuses on the purchase and use of tangible personal property, a distinction which taxes the sale or use of such property while not taxing purchases of services or intangibles, is fundamental to the operation of the system. None of this property actually escapes taxation in the hands of its final purchaser. Both the retail purchase by a reader of a newspaper and the retail purchase by K Mart of its printed advertising are subject to the same Idaho tax. See Idaho Code § 63-3612 (1976) *supra* note. 6. Only transactions not involving a retail sale of tangible personal property are excluded from tax. Accordingly, the fact that different tax consequences result between these economically and legally different transactions is not the basis for a substantial federal equal protection challenge.

C. TAXING K MART'S PRINTED ADVERTISING DOES NOT VIOLATE K MART'S FREEDOM OF EXPRESSION

It is clearly established that freedom of the press does not mean freedom from all taxation. This Court has held:

> It is beyond dispute that the States . . . can subject newspapers to generally applicable economic regulations without creating constitutional problems. [citations omitted]

Minneapolis Star and Tribune, Co. v. Minn. Commissioner of Revenue, 460 U.S. 575 (1983).

Idaho's sales and use tax is a general system of taxation imposed on those who purchase and use tangible personal property. Printed materials are expressly included in the scope of the tax. See, *supra* note 6. K Mart's attempt to cast Idaho's tax in the role of taxing some forms of speech while exempting others is a distortion disguised by the narrow focus of the argument. This narrow focus ignores the general fact that retail purchasers of both kinds of printed material pay the same tax along with retail purchasers of most other tangible personal property.

When K Mart purchases printed avertising from a printer a retail sale occurs. K Mart never resells the advertising. Instead, the material is used to further K Mart's business. K Mart pays a distributor (in this case newspapers) for the service of placing the advertising into possession of potential K Mart customers.

A newspaper is also purchased at retail by a newspaper reader who uses the newspaper for his own purposes.

Both of these retail purchasers pay the same tax on their purchase of property. Neither the newspaper nor the printed advertising is treated discriminatorily.

Cases in which this court have stricken state taxes as violating first amendment freedom of press are easily distinguishable. Both *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936) and *Minneapolis Star and Tribune Co. v. Minn. Commissioner of Revenue, supra,* struck down taxes which expressly singled out a narrow part of the newspaper industry with apparent censorial intent or effect. These defects are not present here both because all printed material is similarly taxed and the tax is part of a general system of taxation which does not single out the newspaper or printing industry. Nor is this case similar to *Arkansas Writer's Project, Inc. v. Ragland,* No. 85-1370, presently pending before this Court. While the Arkansas statute provides an exemption for some printed publications and not others—the Idaho statute, as we have shown, does not.

Thus, the tax imposed on K Mart for its use of its printed advertising in Idaho is a proper application of a general system of taxation. There is no specific focus on the treatment of any form of expression. All forms of printed material are taxed equally based on their purchase price. This statutory system presents no substantial freedom of expression issue.

III. THERE IS NO SPLIT OF AUTHORITY AMONG STATES ON ANY SUBSTANTIAL FEDERAL ISSUE.

The courts of several states have reached different results about the application of state sales and use taxes to printed advertising similar to that at issue here. These differences result from different state statutes or interpretations of the meaning of those statutes. These cases

do not represent a split of authority on federal constitutional issues. It follows that there is no need for this Court to resolve any such differences.

K Mart argues that the issues it presents have generated conflicting decisions from various state courts, and that such divergence of opinion requires resolution by this Court. J.S. pp. 21-22. However, a review of the cases cited by appellant reveals that the conflict is not of a constitutional magnitude requiring this Court's attention. Resolution of each case turned upon whether or not the respective court defined the term "newspaper" so as to include advertising supplements, whether printed in-state or out-of-state. *See: Appeal of K Mart Corp.*, 238 Kan. 393, 710 P.2d 1304 (1985) (interpreting Kan. Stat. Ann. § 79-3606(m) (1986 Cum.Sup.)); *Caldor, Inc. v. Heffernan*, 183 Conn. 566, 440 A.2d 767, 25 A.L.R. 4th 740 (1981) (interpreting Conn. Gen. Stat. § 12-412(f), now Conn. Gen. Stat. § 12-412(6) (1985)); *Daily Record Co. v. James*, 629 S.W.2d 348 (Mo. En Banc 1982) (interpreting Mo. Rev. Stat. § 144.020.1 (1986), and § 144.030.3(7) currently codified at § 144.030.2(8) (1986)); *Eagerton v. Dixie Color Printing Corp.*, 421 So.2d 1251 (Ala. 1982), As Corrected on Denial of Rehearing (1982) (interpreting Ala. Code § 40-23-2(1) (1985)); *K Mart Corp. v. S.D. Dept. of Revenue*, 345 N.W.2d 55 (S.D. 1984) (interpreting S.D. Codified Laws Ann. § 10-46-2 (1982) and § 10-45-12.1 (1986 Cum. Sup.)); *Ragland v. K Mart Corp.*, 274 Ark. 297, 624 S.W. 2d 430 (1981) (interpreting Ark. Stat. Ann. § 84-1904(f) (1980) and § 84-3106(B) (1980); *Sears, Roebuck & Co. v. State Tax Commission*, 370 Mass. 110, 345 N.E.2d 897 (1976) (interpreting Mass. Ann. Laws ch. 64H, § 6(m) and ch. 64I, § 7(b) (Michie/Law, Co-op 1978); *Sears, Roebuck*

& Co. v. Woods, 708 S.W.2d 374 (Tenn. 1986) (interpreting TCA § 67-6-329(a)(3) (1986 Cum. Sup.)); *Wis. Dept. of Revenue v. J.C. Penney Co.*, 108 Wis.2d 662, 323 N.W.2d 168 (App. 1982) (interpreting Wis. Stat. Ann. § 77.54(15) (West 1986 Cum. Sup.)). In other words, the definition of the term newspaper did not depend upon any invidious classification forbidden by the Equal Protection Clause; rather, the definition depended upon whether the respective court concluded that advertising supplements constituted one of the components of a newspaper. The conflict among the cited cases is that some jurisdictions defined a newspaper to include advertising supplements whereas other jurisdictions did not.

Once the respective courts determined what components comprise a newspaper, each court uniformly applied either the applicable tax statute or tax exemption. In none of the cited cases did the respective court strike down the statute under which the taxing authorities sought to impose the tax, or the exemption under which the taxpayer sought refuge. With the resolution of the definition of the term newspaper, no constitutional challenges to the tax statute, or exemption, remained. Hence, the conflict among the cited cases does not rise to a constitutional level.

Not only do these cases fail to support K Mart's argument, they do not directly relate to any issue in this case. While these cases dealt with the definition of a newspaper, this case centers around the imposition of Idaho's use tax on K Mart's consumption of tangible personal property, i.e., printed advertising. As we have shown, K Mart consumes the printed advertising it purchases from the print-

er,[8] regardless of whether or not the printer resides in-state or out-of-state. Having purchased the advertising supplements, appellant, or any other advertiser opting to do so, hires the services of the chosen newspaper's extensive distribution system. *Caldor, Inc. v. Heffernan,* 183 Conn. at 574, 440 A.2d, at 771, 25 A.L.R. 4th at 746; *Sears, Roebuck & Co. v. Woods,* 708 S.W.2d, at 379.

Concerning any possible implication of the freedoms guaranteed by the First Amendment, none of the cited cases illustrate any conflict among various state court decisions. A cursory review of these cases quickly reveals that none of the cases turned on First Amendment analysis. Hence, no conflict. On a more fundamental level, none of these cases, nor the present case, implicate the First Amendment guarantees because the incidence of the tax, not falling, directly or indirectly, on any newspaper, is not " . . . a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Grosjean v. American Press Co.,* 297 U.S. at 250 (1936).

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[8] Appellant concedes, as it also did in *Appeal of K Mart Corp.,* 238 Kan. 393, 710 P.2d 1304 (1985), that it properly owes tax on supplements purchased from printers to be used at its stores by both employees and customers. This situation bears little, if any, difference from the contested scenario where K Mart purchases advertising supplements and then makes use of a newspaper's extensive distribution system. *Caldor, Inc. v. Heffernan,* 183 Conn. 566, 574, 440 A.2d 767, 771, 25 A.L.R. 4th 740, 746 (1981).

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CONCLUSION

For the reasons stated herein, this appeal should either be dismissed or the decision of the court below should be affirmed.

DATED this 27 day of February, 1987.

Respectfully submitted,

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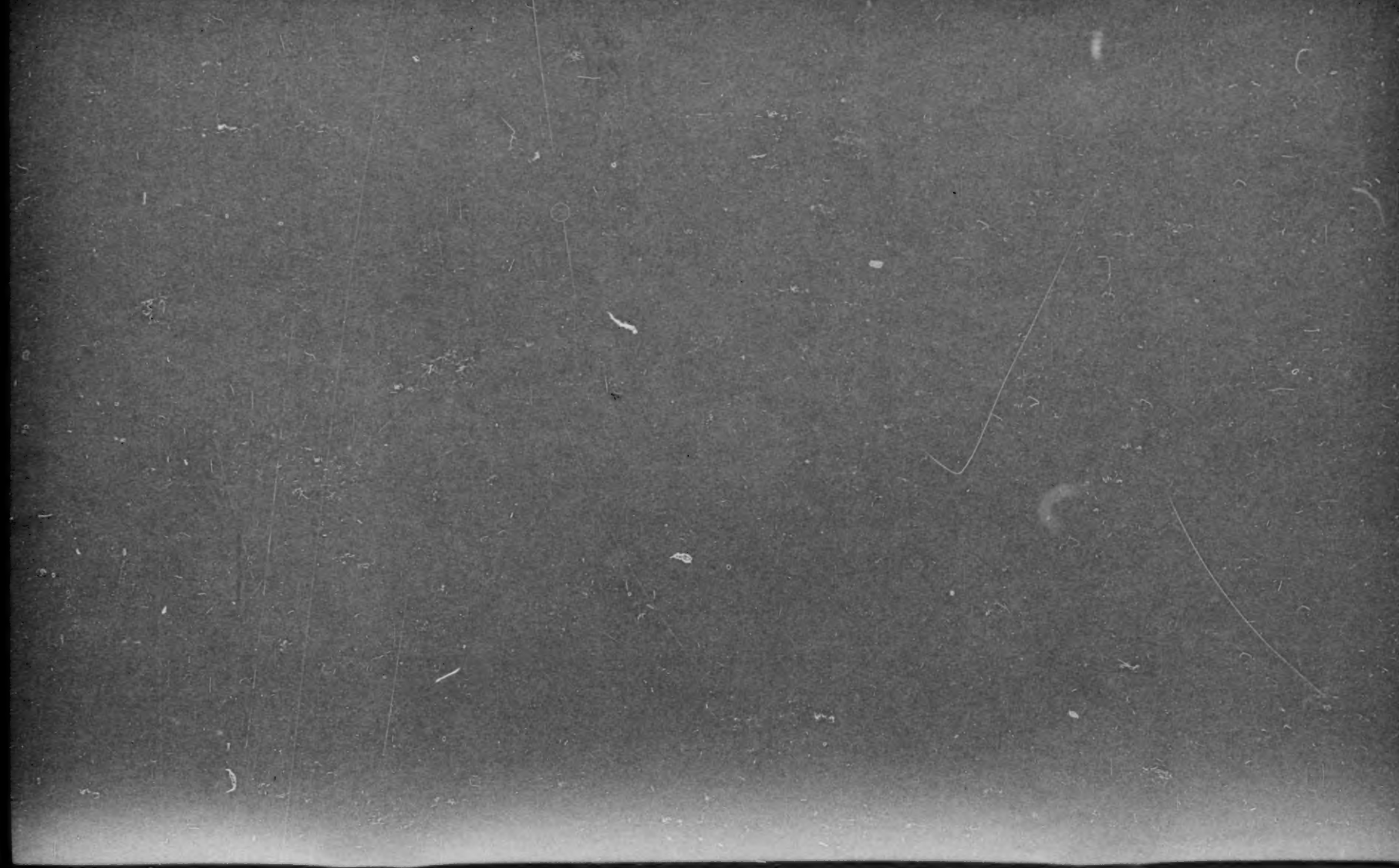

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No. 86-1286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

REPLY MEMORANDUM

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REPLY MEMORANDUM

In its Motion to Dismiss or Affirm ("Motion"), appellee Idaho State Tax Commission ("Tax Commission") advances the remarkable proposition that the patently unconstitutional exemption under Idaho's tax scheme, as made express in Regulation 15A, of newspapers from payment of any sales or use tax on advertising supplements raises no substantial federal question because that regulation is asserted to be "inconsistent," Motion, at 2, with the pertinent state tax statutes.[1] Under the Tax Commission's reasoning,

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[1] The Tax Commission's assertion, Motion, at 2, that the court below "held" Regulation 15A to be "invalid for being inconsistent with the statute" is a transparent attempt by the Com-

a State would be free to practice virtually any form of unconstitutional discrimination without being obligated to equalize its treatment of persons who have been constitutionally injured so long as that State were prepared to confess that its legislature never authorized the particular discrimination. The Tax Commission does not, of course, cite so much as a single case in this Court in support of that sweeping proposition because no case does so.[2] Indeed, the Tax

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mission to avoid having to mount a defense in this Court to the blatant discrimination it practiced against appellant during the relevant tax period. That assertion may also be intended to suggest that this case is of no continuing significance insofar as the Commission's administration of Idaho's tax laws is concerned. The Commission's assertion is, however, disingenuous because, as discussed below, the actual position of the Commission in this Court is that the unequal taxation challenged by appellant has its roots in the Idaho Sales Tax Act itself, not just in Regulation 15A. That Act, according to the Commission, Motion, at 13-14, permits the taxation only of the sale or use of tangible personal property and, so interpreted, could not provide a basis for taxing a newspaper's printing of appellant's advertising supplements because the Commission maintains that that transaction involves no transfer of ownership of tangible personal property. The clear import of the Commission's position in this Court is that it asserts the authority to continue to enforce Idaho's tax laws in precisely the same manner that led to appellant's challenge. Appellant submits that what the court below actually did was to avoid altogether passing on the validity of Regulation 15A by, in effect, denying appellant the right to challenge that regulation and the statutory scheme of which that regulation was, and continues after the decision below to be, an integral part.

[2] It is important to bear in mind that at no time in this litigation has the Tax Commission ever suggested that the discrimination authorized by Regulation 15A did not in fact occur. Thus, the Commission's argument necessarily reduces to the

Commission's defense of the judgment below itself raises a substantial federal question, because if the several States may conduct the business of government under the theory propounded by the Tax Commission, the ability of persons, including corporate entities such as appellant, to vindicate their federal constitutional rights to equal treatment under the law would be, particularly as regards taxation,[3] nullified.

In advancing this argument, the Tax Commission does not deny appellant's assertion, Juris. Stat., at 7 n.1, that "the discrimination practiced under Regulation 15A was practiced by the State of Idaho for the entirety of the taxable period involved in this case." Nor does the Tax Commission deny appellant's assertion, Juris. Stat., at 15, that "[i]n the Idaho courts, the [Tax Commission] forthrightly acknowledged that Idaho's tax scheme gave preferential treatment to newspapers . . . ." The Tax Commission does not dispute these assertions because there is no basis for its doing so.[4]

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proposition that a state official acting contrary to *state* law cannot invade federal constitutional rights of private persons. That proposition was squarely rejected by Justice Brandeis, writing for a unanimous Court, in *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. 239, 246 (1931).

[3] Because it is extraordinarily difficult for a private party to secure an injunction against the collection of taxes in either the federal or state court systems, the ability of States under the Commission's argument to impose unconstitutional taxation without fear of having to disgorge unjustly collected revenues is manifest.

[4] The Tax Commission, Motion, at 4, makes the curious statement that "K Mart was taxed under authority of the statutes and has not actually been subjected to the regulation it challenges." That statement is, literally, untrue even if it were rel-

As importantly, the Tax Commission does not challenge appellant's assertion, Juris. Stat., at 12 n.6, that as a matter of state law it can no longer force those newspapers which benefited from the preferential treatment accorded by Regulation 15A between 1974 and 1977 to pay a sales tax on advertising supplements they printed and distributed during that period. At bottom, the Tax Commission's apparent position before this Court is that the provisions of the federal constitution invoked by appellant in the Idaho courts and this Court do not redress the constitutionally unequal treatment perpetuated by Regulation 15A and the Idaho tax scheme at issue. But as appellant argues, Juris. Stat., at 11-12 & 16-17, the Constitution, *ex proprio vigore*, provides a federal remedy for the unlawful collection of a tax from one taxpayer if that tax is not imposed on a constitutionally similarly situated taxpayer. Applying this Court's statement in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946), the right involved in this case "is the right to equal treatment. . . . The constitutional requirement . . . is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seek-

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evant to the issues in this case. Regulation 15A specifically classifies the sale of "advertising stuffers" by a non-newspaper printer to an advertiser as a "retail sale of tangible personal property." The Tax Commission expressly relied on Regulation 15A from the beginning, as indicated in the January 18, 1982 decision of the Idaho Board of Tax Appeals in this matter. Juris. Stat. App., 30a. That same regulation expressly exempts from taxation the same "advertising stuffer" if printed and distributed by a newspaper. Thus, appellant has not only been "subjected to the regulation it challenges," but it must, pursuant to the judgment below, pay a tax which Idaho newspapers were not required to pay.

ing an upward revision of the taxes of other members of the class."

The majority of the Tax Commission's Motion, at 5-16, is largely unresponsive to appellant's positions because it defends the constitutionality of certain applications of Idaho's tax scheme which appellant has never challenged in this litigation[5] after purporting to eliminate from consideration the very discrimination which gave rise to appellant's constitutional challenge to the Idaho tax scheme—the preferential treatment of Idaho newspapers under Regulation 15A on its face and as implemented by the Commission.[6]

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[5] Contrary to the Commission's assertion, Motion, at 19 n.8, appellant does not "concede" that it "properly owes" tax on advertising supplements which it uses in its stores in Idaho. If, under Idaho's tax scheme, such advertising supplements would be taxed equally whether printed by an out-of-state printer or in-state by an Idaho newspaper, the imposition of that tax might not be challenged by appellant. The salient point, however, is that appellant has not challenged that tax in this case, which makes irrelevant the Commission's assertion.

[6] The Tax Commission argues, Motion, at 9, that because neither in-state nor out-of-state newspapers pay any tax on advertising supplements which they print and distribute, "both in-state and out-of-state printing businesses are treated equally" and, therefore, there is no discrimination against interstate commerce. However, the Commission cites no case in this Court for the proposition that a State may escape the strictures of the Commerce Clause by failing to discriminate against *all* of the interstate commerce that may be implicated in a particular discriminatory scheme of taxation. *Cf. Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (commercial advantage extended to some, but not all, in-state manufacturers of alcoholic beverages held violative of Commerce Clause). Thus, that some unknown out-of-state newspaper publisher *might* have, during the relevant period, printed and distributed with its newspaper some of ap-

In at least one respect, however, the Commission's argument warrants a reply because under it the Commission would, in the total absence of Regulation 15A, continue not to impose any tax on advertising supplements printed for appellant by Idaho newspapers while continuing to impose a use tax on the same supplements if printed by appellant. Under that argument, Motion, at 13-14, an advertising supplement printed by a newspaper is not taxed because it purportedly "involves no transfer of ownership of tangible personal property between the parties to the contract." *See also* Motion, at 4 n.1. This argument was rejected by the trial court, which squarely held that "[t]here is no difference in the product prepared by either printer or in the printing services performed." Juris. Stat. App., 23a. But the Tax Commission's reiteration of this argument in its Motion suggests strongly that, in the future, the Commission will not impose a sales or use tax on appellant's advertising supplements so long as those supplements are printed, as well as distributed, by Idaho newspapers.

Indeed, under the Commission's argument it apparently regards itself as having no statutory authority to impose any tax on advertising supplements printed by Idaho newspapers because it does not view such a "transaction" as involving the sale or use of tangible personal property in Idaho which would per-

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pellant's advertising supplements without paying Idaho's use tax is of no avail to the Commission. Furthermore, appellant in this case claims a right of access to the distribution systems of Idaho newspapers on the basis of tax treatment which does not discriminate *against* interstate commerce.

mit taxation under Idaho's sales or use tax statutes.[7] Absent a representation to this Court—and the Tax Commission has made none—that it has revoked Regulation 15A, that it presently possesses the statutory authority to impose a sales or use tax on advertising supplements printed by Idaho newspapers, and that it intends to tax those advertising supplements, this Court must assume that the Tax Commission will continue to implement Idaho's sales and use tax statutes in the same unconstitutional fashion as it has in the past notwithstanding the Commission's facile statement that the court below believed Regulation 15A to be "inconsistent" with those statutes.[8]

Finally, the Tax Commission's assertion, Motion, at 16-19, that there is no split of authority among the

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[7] In the court below, the Commission took the position that it does not tax advertising printed by a newspaper published and distributed with the newspaper (whether as part of the newspaper or as a separate "supplement" to it) simply because the contract between the advertiser and the publisher is not a sale of tangible personal property. It necessarily follows from this position, which the Commission continues to embrace in this Court, that it has no statutory authority to impose a sales or use tax on the printing of advertising supplements by Idaho newspapers. Given this, the court below necessarily sustained, for purposes of this Court's *appellate* jurisdiction, the validity of Idaho's tax scheme challenged by appellant because it either upheld the sales and use tax statutes or it denied appellant the opportunity to challenge them. *See* Juris. Stat., at 11-12.

[8] Even if Idaho's legislature were to enact a statute authorizing the taxation of what the Commission terms the "contract" between an Idaho newspaper and a person to print advertising supplements, implementation of that legislation "would not relieve the harm inflicted during the time the [appellant's] imported products were taxed but locally produced products were not." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S., at 267-68 n.7.

state courts regarding the federal constitutional questions presented by this case is incorrect. As appellant argues, Juris. Stat., at 21-22, the Supreme Courts of Tennessee and Wisconsin have expressly rejected federal constitutional challenges to discriminatory taxation indistinguishable from that at issue in this case, while the Supreme Court of Alabama, Juris. Stat., at 23 & n.14, has struck down such discriminatory taxation under the Equal Protection Clause of the Fourteenth Amendment.[9]

The questions presented by this case are clearly substantial and warrant plenary review by this Court. The theory under which the Tax Commission would have this Court dismiss this appeal for want of a substantial federal question or affirm the judgment below is without precedent in this Court and is demonstrably inconsistent with cases decided by this Court. The Tax Commission's refusal to defend directly the preferential treatment of newspapers under Regulation 15A and the Idaho Sales Tax Act does not render the judgment against appellant any less unconstitutional. The reiteration in this Court by the Commission of its position that, as a matter of state law, the printing of advertising supplements by Idaho

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[9] In apparent recognition of the force of appellant's First Amendment challenge, the Tax Commission supplants its correct characterization of Regulation 15A in the court below as granting preferential treatment to Idaho newspapers with the assertion that "all printed material is similarly taxed" and that the tax "does not single out the newspaper or printing industry." Motion, at 16. This assertion is unadorned misstatement; if it were not, the trial court would not have declared Regulation 15A to be unconstitutional and the Supreme Court of Idaho would not have distanced itself from the "questionable distinctions" challenged by appellant.

newspapers does not constitute a taxable event suggests strongly that the Commission intends to perpetuate this unconstitutional discrimination. Probable jurisdiction should be noted and this case should be set for argument.

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